Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Qwest Communications International Inc., Consolidated Application for Authority to Provide In-Region, InterLATA Services in Montana, Utah, Washington and Wyoming	))))))))	WC Docket No. 02-189

REPLY COMMENTS OF AT&T CORP.

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark E. Haddad
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
555 West Fifth Street
Los Angeles, California 90013
(213) 896-6000

David L. Lawson
Mark Schneider
R. Merinda Wilson
James P. Young
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4263

Mary B. Tribby
AT&T Communications of the Mountain States, Inc.
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
(303) 298-6163

Attorneys for AT&T Corp.

August 26, 2002

TABLE OF CONTENTS

FCC ORDERS CITED

SHORT CITE	**FULL CITE**
BellSouth Louisiana II Order	Memorandum Opinion and Order, *Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599 (1998)
Georgia/Louisiana 271 Order	Memorandum Opinion and Order, *Joint Application of BellSouth Corporation et al. for Provision of In-Region InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35 (rel. May 15, 2002)
Michigan 271 Order	Memorandum Opinion And Order, *Application Of Ameritech Michigan Pursuant To Section 271 Of The Communications Act Of 1934, As Amended, To Provide In-Region, InterLATA Services In Michigan,* 12 FCC Rcd. 20543 (1997)
New Jersey 271 Order	Memorandum Opinion and Order, *Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in New Jersey*, WC Docket No. 02-67 (rel. June 24, 2002)
NY 271 Order	Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953 (1999)
Pennsylvania 271 Order	Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419 (2001)
Texas 271 Order	Memorandum Opinion and Order, *Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354 (2000)

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.,	)	
Consolidated Application for Authority to	)	
Provide In-Region, InterLATA Services in	)	WC Docket No. 02-189
Montana, Utah, Washington and Wyoming	)	
	)	
	)	

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the joint application of Qwest for authorization to provide in-region, interLATA services in Montana, Utah, Washington and Wyoming.

INTRODUCTION AND SUMMARY

Qwest's own actions have now confirmed beyond doubt that this multi-state application, like Qwest's other pending multi-state application, was premature, is patently inadequate, and must be denied. The record upon which Qwest urges the Commission to rule bears no resemblance to the case Qwest urged in its application. Qwest continues to modify its OSS assertions on a daily basis with *ex parte* submission after *ex parte* submission, and no end is in sight. Qwest *still* has not filed the final UNE rates it asks the Commission to bless, and if the other pending application is any guide, it will not do so until days before the expiration of the statutory period, at which point virtually *all* of the rates will be different than those filed with the application. Just days ago, Qwest informed the Commission that it should not base its analysis of Qwest's compliance with the checklist nondiscrimination requirements on the record established in the state proceedings or on the application or comments filed in this proceeding, but on portions of as many a hundred secret interconnection agreements that Qwest now plans to file some time before the statutory deadline but has heretofore intentionally hidden from regulators and new entrants. And after vehemently denying that its pervasive "IRU" arrangements are services (as opposed to "asset sales"), Qwest has now admitted to the SEC that those arrangements are, in fact, services – and thus, as AT&T and others have demonstrated, that Qwest is presently violating section 271.

No section 271 applicant – certainly, no successful section 271 applicant – has ever exhibited such extraordinary disdain for the Commission and its rules. Qwest is plainly of the view that the Commission is a lawless institution that simply lacks resolve to apply the plain terms of the Act. And that is exactly the message that will be sent if the Commission bows down to Qwest. The Commission should instead reject Qwest's pending applications, and require that Qwest refile *after* it has gathered the information necessary to satisfy its burden of proving that it has satisfied the requirements of section 271.

But this is not a problem merely of process – although Qwest's treatment of the Commission's complete-when-filed rules as a complete joke alone requires rejection. Rather, much of the information that Qwest withheld from its application confirms the many fatal substantive defects in the application. It is now clear that Qwest *currently* is unlawfully providing long distance service, is violating Commission-mandated accounting principles required under § 272 of the Act, is charging competitors above-TELRIC rates for unbundled network elements, is relying upon performance data that is skewed by secret deal bribes and special treatment, and is discriminating in the provision of both interconnection and UNEs. With regard to the latter, Qwest's last-minute half-measure to address the reality that nondiscrimination findings are impossible absent a showing that the interconnection and network element terms that Qwest makes available to favored carriers are available to *all* carriers is wholly inadequate. Indeed, this proceeding has devolved into a series of *mea culpas*, in which Qwest concedes unlawful and anticompetitive conduct that precludes findings of checklist and public interest compliance and then argues that its ongoing misconduct can be ignored now that it has finally confessed. The Commission simply cannot, consistent with the requirements of the Act, endorse this approach.

Undoubtedly, the easy, non-confrontational course is to shift the analysis of the severity and effect of Qwest's behavior and checklist failings to some other future proceeding, where monetary penalties could be assessed, or perhaps even Section 271 authority suspended. But the Act requires more responsible adherence to its terms. The Commission cannot sway from its obligation to deny the application unless the record *in this very proceeding* adequately supports the conclusion that Qwest has met its Section 271 burden. It is imperative that the Commission send a clear signal to the industry that it will strictly enforce the competitive checklist (and the public interest) requirements, and that the applicant (not the opponents of the application) bears the burden of proving that it has complied with those pre-conditions of intraLATA entry.

The remainder of the comments are organized as follows:

In Part I, AT&T explains that the record in this proceeding relating to Qwest's "secret deals" conclusively proves that Qwest is not providing nondiscriminatory access to its bottleneck local network facilities as required by multiple checklist items. Qwest indisputably provides better prices and other terms to some CLECs than others. Moreover, Qwest's special treatment of its secret deal partners has given an inflated and otherwise false view of Qwest's treatment of CLECs and of the openness of its local markets to competition. The efficacy of Qwest's OSS tests, for example, has been compromised, because they relied in material part on evaluation of service provided to favorably-treated carriers. And at the very same time, Qwest's approach of "buying off" CLECs that were bringing forward evidence of Qwest's many failures to adhere to the Act's market opening requirements has subverted the entire Section 271 process. Under these circumstances (and, as AT&T will explain in greater detail in its August 28 "secret deals" comments), Qwest cannot possibly establish checklist compliance, and that fact alone precludes granting the application.

Part II shows that the comments overwhelmingly confirm that Qwest has failed to satisfy its burden of proving that its OSS are non-discriminatory. Qwest fails to provide an adequate change management process. As explained by KPMG, many of the provisions of Qwest's "redesigned" CMP are too recent to evaluate, and Qwest provides no hard evidence of its compliance with its 'new and improved' change management process. Qwest likewise fails to provide a stable test environment that mirrors, but is separate from, the production environment.

The comments further confirm that Qwest's interfaces fail to provide CLECs with access to OSS functionality that is equivalent to that which Qwest enjoys in its retail operations. Qwest fails to provide nondiscriminatory access to pre-ordering in numerous respects: (1) Qwest has not provided CLECs with the ability to integrate EDI ordering and ordering functions successfully; (2) Qwest has not shown that it provides CLECs with nondiscriminatory access to the same loop qualification information that is available to Qwest itself; (3) Qwest has not provided CLECs with the ability to perform (or have performed) mechanized loop testing before actual provisioning; and (4) Qwest fails to provide nondiscriminatory access to pre-ordering functions, because it changes due dates for CLEC orders far more frequently than for its own retail orders.

Likewise, Qwest fails to provide nondiscriminatory access to ordering and provisioning functions. Qwest's systems are plagued by high-rates of order rejection, manual processing of electronically submitted CLEC orders, and manual errors. Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete. Qwest's billing systems are patently inadequate. Qwest does not provide complete, accurate, and timely daily usage files ("DUFs") and wholesale bills to CLECs. In addition to the numerous billing errors that AT&T described in its opening comments, for example, Eschelon states that *all* of its bills for UNE-Eschelon/UNE-Star (which represents approximately 60 percent of Eschelon's total bill amounts) have been inaccurate, and that its DUF records do not include minutes of use for intraLATA toll traffic carried by Qwest.

In addition, the comments confirm that Qwest's performance data are inaccurate and unreliable and cannot reasonably be considered a reflection of Qwest's actual performance. The Liberty and Cap Gemini Ernst & Young performance measurement audits were not designed to test and did not test the accuracy of Qwest's raw data inputs; the study objective of the Liberty data reconciliation was fundamentally flawed, and the study itself was extremely limited as to temporal, geographical, product and measurement scope. And, citing KPMG's findings, both the Montana PSC and the Washington UTC described these errors as serious and continuing problems. Against this backdrop, there is no sound basis upon which Qwest can reasonably contend that the KPMG OSS test or the other audits and data reconciliation processes upon which it relies somehow validated the accuracy of its performance data. Finally, as indicated above, even Qwest's inadequate and unreliable data show that it has not satisfied its checklist obligations in such competitively critical areas as order rejections, order flow-through, and manual processing.

Part III shows that the commenters, the DOJ, and even Qwest itself confirm that Qwest has failed to satisfy its burden of proving that its rates comply with checklist item 2. Qwest relies on a benchmarking analysis against Colorado to justify its rates in the four states in its application. But after Qwest lowered its Colorado rates to correct for one of many clear TELRIC errors that inflate those rates, Qwest never filed re-calibrated rates for the states that it benchmarked to Colorado. Thus, the rates on which Qwest's application is predicated are not TELRIC-compliant, even by Qwest's standards.

Moreover, the comments confirm that Qwest's Colorado recurring and non-recurring rates continue to be inflated by clear TELRIC errors. Therefore, even if the rates in the four states were equivalent to those in Colorado (which they are not), that analysis would not show that the rates in those states are TELRIC-compliant. The fact that the rates in some of the states in Qwest's Application are overstated is further confirmed by the fact that local entry is not economically feasible. On this record, there can be no finding that Qwest's rates comply with Checklist Item 2.

Part IV addresses the fact that Qwest is denying CLECs reasonable and nondiscriminatory access to interconnection, to unbundled network elements, and to resale, in violation of its checklist obligations. In particular, Qwest's recent attempts to defend its discriminatory interconnection policies with respect to forecasting requirements and trunking in excess of 50 miles are meritless. Similarly, Qwest's refusal to augment its facilities in situations in which it does so for its own customers is blatantly discriminatory and anticompetitive.

Part V shows Qwest has failed to meet its burden of establishing that Qwest and its section 272 affiliate will comply with each of the requirements of section 272 if Qwest's application is granted. None of the state commissions even addresses Qwest's failure, as confirmed by a Minnesota ALJ, to present evidence that it does not and will not jointly own switching and transmission facilities, either directly or indirectly, with its section 272 affiliate. Nor do the state commissions rebut the fact that Qwest and its section 272 affiliate fail to comply with the requirement that they have "separate officers, directors, and employees," as found by the Minnesota ALJ. The state commissions are also silent with respect to the Minnesota ALJ's finding that Qwest was in violation of section 272(b)(5)'s requirement of "arm's length" transactions, because both Qwest and its section 272 affiliate depend on their joint parent, QSC, to provide legal, public policy, and financial services for all their transactions. And no commenter addresses Qwest's failure to establish that it will comply with its nondiscrimination obligations under section 272(c) and with the joint marketing restrictions of section 272(g).

Part VI shows that granting the joint application is not in the public interest. As AT&T and other commenters demonstrated, Qwest has engaged in a pattern of discriminatory and anticompetitive conduct that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Qwest has engaged in a pervasive effort to forestall competition in its local exchange markets at the same time that it has launched illicit efforts to provide service across LATA boundaries. In a variety of states and a variety of ways, Qwest has been responsible for inhibiting local entry, having been adjudicated "guilty" for, among other things, repeatedly violating section 271 and refusing to permit UNE-P testing or to provide access to inside wiring in multiple dwelling units. And Qwest has been revealed to have entered into patently discriminatory secret interconnection deals. By failing to file the agreements as required by Section 252, and worse yet, by attempting to evade informed state commission and FCC review of its compliance with Section 271 checklist requirements by purchasing with these secret discriminatory deals the silence of complaining CLECs, Qwest has made it clear that there is no reason for the Commission to give it the benefit of the doubt in its review of this unprecedented application.

Finally, Qwest's performance enforcement plans do not provide sufficient assurance that Qwest will comply with its statutory obligations in the future. The state regulatory commissions simply do not come to grips with AT&T's showing that the unreliability of Qwest's performance data, which serve as the springboard for remedies payments, would thwart the efficacy of the performance assurance plans. And even if Qwest's performance data were accurate, Qwest's performance assurance plans contain fundamental flaws that prevent them from serving as an effective deterrent against future backsliding. Accordingly, Qwest's Montana, Utah, Washington and Wyoming applications, as well as Qwest's initial five state joint Application should be denied.

I. QWEST'S PERVASIVE AND ONGOING SECRET DEALS DISCRIMINATION REQUIRES THAT THE COMMISSION REJECT THESE APPLICATIONS.

The comments confirm that the Commission cannot approve Qwest's Application on the existing record because of the overwhelming "secret deals" evidence that Qwest is not, as required by multiple checklist items, providing nondiscriminatory access to its bottleneck local network facilities.[1] Moreover, because it is now clear that in some cases, the favored CLECs agreed in return to acquiesce in proceedings before state commissions and this Commission with respect to Qwest's instant section 271 Applications, Qwest has prevented full development of the regulatory record. By buying the silence of CLECs, Qwest has rendered the record on critical issues such as checklist compliance unreliable, and has cast the entire review mechanism into doubt. Worse still, the record evidence of Qwest's commercial performance and other

---

[1] *See* 47 U.S.C. §§ 271(c)(2)(B)(i) (incorporating the non-discrimination obligations of sections 251(c)(2) and 252(d)(1)), 271(c)(2)(B)(ii), (iii), (vii), (ix), (x), (xii), (xiv) (incorporating the non-discrimination obligations of sections 251(c)).

obligations has been skewed by data from secret deal partners that received special treatment that is not available to other CLECs, rendering this evidence useless in determining Qwest's present checklist compliance. Under these circumstances, the Commission cannot make a reasoned finding of checklist compliance that would survive judicial review.[2]

A. The Secret Deals Discrimination Is Undisputed.

The comments remove any possible doubt that Qwest has entered into blatantly discriminatory agreements with favored CLECs, giving them preferential UNE rates and better terms for provisioning and resolving disputes over service, to the competitive detriment of all others.[3] In addition, it is beyond dispute that in some cases, the favored CLECs agreed in return to acquiesce in major Qwest regulatory initiatives, including Qwest's instant section 271 application.[4] Indeed, as AT&T demonstrated, the Iowa Utilities Board ("IUB") and the Arizona Corporation Commission ("ACC") Staff issued decisions concluding that Qwest entered into interconnection agreements with individual CLECs that granted them preferential rates, terms and conditions (thereby discriminating against other CLECs) and also violated section 252(a)(1) and applicable state rules by failing to file these agreements with the state commissions.[5] The ACC Staff further noted the "egregious nature of [Qwest's] infraction" with respect to seven

[2] Qwest has recently informed the Commission that it will file certain negotiated agreements between it and CLECs for approval by state commissions. *See* Letter from Melissa E. Newman to Ms. Marlene H. Dortch, WC Docket Nos. 02-148 and 02-189 (August 20, 2002). Because the Commission has requested comments on Qwest's August 20 letter, AT&T will not address it here. AT&T will address the discrimination evidence and the evolving release of concealed interconnection agreements in its August 28 filing.

[3] *See* McLeodUSA Comments at 2; Pilgrim Telephone Comments at 4-8; Touch America Comments at 3, 28-29.

[4] *See* McLeodUSA Comments at 2; Pilgrim Telephone Comments at 5-7; Touch America Comments at 3, 28-29.

[5] *See AT&T Corp. v. Qwest Corporation, Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing*, Docket No. FCU-02-2 (May 29, 2002) ("Iowa Order") (Attachment 3 to AT&T's Comments); *Staff Report And Recommendation In The Matter Of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002) ("Arizona Report") (Attachment 4 to AT&T's Comments).

agreements which had provisions "in which CLECs agreed that they would not participate in regulatory proceedings before the FCC," including Section 271 proceedings.[6]

Moreover, evidence continues to mount in the ongoing proceedings in Iowa, Arizona and Minnesota that Qwest's pattern of providing secret rates, terms and conditions for interconnection to selected carriers is not limited to the material that had become public at the time of Qwest's first multi-state filing at the FCC. In Iowa, for example, the IUB very recently determined that eleven new agreements that Qwest had failed to file, in addition to the three agreements that were the subject of the Iowa Order, should have been filed and must now be reviewed and made public. Additionally, nineteen additional agreements apparently will be made available for review, on a confidential basis subject to a protective order, for a determination of whether they contain rates, terms or conditions of interconnection that require that the agreements be filed pursuant to Section 252. While AT&T has made efforts to obtain copies of these agreements, it was not until recently, that AT&T was able to receive copies of only some of the fourteen agreements that the IUB has determined must be made public. It remains undisputed, however, that the IUB's consideration of Qwest's pattern of entering into clandestine interconnection agreements, some of which already have been demonstrated to include discriminatory terms, is not nearly complete.

The ACC's investigation in Arizona is similarly incomplete, but continues to provide significant evidence that Qwest persists in entering into interconnection agreements that must be, but have not been, filed, approved pursuant to Section 252, and made public for CLECs to pick and choose desirable terms and conditions of interconnection. On August 14, 2002, the ACC Staff released a Supplemental Staff Report and Recommendation concerning the items addressed

[6] Arizona Report at 1-2, 19.

in the Arizona Report.[7] After receiving and reviewing information generated as a result of further data requests, the ACC Staff amended its original list of 25 agreements, eliminating several agreements but adding several more, bringing to 28 the number of agreements that Qwest must now file in Arizona. The revised list includes agreements with ten carriers, including Eschelon, McLeod, Covad, ELI, Allegiance, GST and WorldCom. The ACC Staff also revealed that Qwest had additional oral agreements with Eschelon and McLeod.[8] In addition, the ACC Staff found that "Qwest had both written and/or oral agreements with XO, Z-Tel (for 60 days only), Eschelon and McLeod wherein these CLECs agreed not to oppose Qwest's 271 application or participate in 271 proceedings."[9] Pursuant to the ACC's procedures, parties have ten days to comment on the ACC Staff's Arizona Report and Arizona Supplemental Report and on the revised list of 28 contracts subject to section 252 filing requirements. Only after those comments are filed will the ACC be prepared to make public these interconnection agreements and their terms.

The ACC's procedures contemplate further analysis of these interconnection agreements as part of the section 271 application process. Specifically, the ACC Staff has recommended that "a sub-docket to the 271 Docket" be opened because "Staff believes that an initial showing has been made that Qwest interfered with the 271 proceeding before the Commission and that the Commission's processes and the ability of two carriers to present their issues to the Commission

---

[7] *Supplemental Staff Report And Recommendation In The Matter of Qwest Corporation's Compliance With Section 252(e) Of The Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271 (Aug. 14, 2002) ("Arizona Supplemental Report") (attached hereto as Attachment 1).

[8] Arizona Supplemental Report at 5 ("Qwest orally agreed with Eschelon that pricing levels for UNE-E would be competitive. In the case of McLeod, there was an oral agreement concerning additional product amounts to be purchased by Qwest under a written purchase agreement. With this agreement, there was also an oral agreement between Qwest and McLeod that McLeod would not oppose Qwest's 271 application as long as Qwest was in compliance with its agreements and all applicable statutes."); *accord* McLeodUSA Comments at 2 (acknowledging existence of oral agreement).

[9] Arizona Supplemental Report at 6.

were adversely impacted."[10] As Staff explained, it believes that Qwest's conduct in this regard raises serious public policy concerns:

> The 271 proceeding is conducted by State commissions in order to determine whether Qwest should be allowed into the interLATA interexchange market in Arizona. Under Federal law, Qwest must meet a myriad of requirements and conditions in order to receive the FCC's approval to offer interLATA service. The State Commission conducts what is a lengthy in-depth proceeding, in Arizona a proceeding that has taken 3 years to process to date, so that the Commission can adequately perform its consultative role with the FCC under Federal law. For this reason, interference with the Commission's processes in the 271 case, in particular, raises serious public policy concerns.[11]

Accordingly, Staff has recommended that Qwest be required to demonstrate "why it should not be held in contempt of Commission rules of process and orders" and has concluded that additional fines are appropriate.[12] Staff also acknowledged that "[f]rom a 271 perspective, there is also the issue of whether the record has been tainted by the unfiled agreements, some of which contained clauses which prohibited carriers from opposing Qwest's 271 application."[13] It will address "any impact on the 271 record" in a separate report.[14]

Similarly, in Minnesota, the PUC is conducting hearings and further analysis of the secret written and oral agreements that have come to light as a result of the Minnesota Department of Commerce (MDOC) Complaint. As part of that complaint proceeding, AT&T has analyzed the eleven public written agreements that are part of the MDOC Complaint.[15] In his testimony, AT&T's representative concluded that the confidential terms were "exceptionally favorable to each of these CLECs" and that "AT&T never had the opportunity to approach Qwest to opt-in to

---

[10] *Id.* at 10.
[11] *Id.* at 9-10.
[12] *Id.* at 10.
[13] *Id.* at 10-11.
[14] *Id.* at 11.

similar or identical arrangements."[16] For example, Eschelon received an "on-site dedicated provisioning team for up to one year [consisting of] a coach and service delivery coordinator . . . to resolve and work through provisioning issues," while AT&T received meetings that were "sporadic and occurred only over the telephone and not face-to-face as described in the Eschelon agreement."[17] Eschelon also received a ten percent reduction of "aggregate billed charges for all purchases made by Eschelon from Qwest," resulting in Eschelon "paying 10% less for wholesale services than AT&T – or any other CLEC – that could not enter this particular agreement."[18]

In another agreement, Qwest also committed "to credit Eschelon $13 per line per month as an interim resolution to compensate Eschelon for Qwest's failure to properly record usage on Eschelon's lines on its daily usage files ("DUF")," thus giving Eschelon a favorable "discount" per line per month; AT&T determined that "Qwest reported accurate switched access records on its DUF files only 48% of the time," but despite reporting this figure "to Qwest during numerous meetings," AT&T was offered no relief.[19] Qwest later increased this credit to Eschelon by an additional "$2 per line for intraLATA toll traffic terminating to Eschelon's switch" where Qwest provided inaccurate access records for this type of traffic, but while AT&T was involved in "several" billing disputes of this type, Qwest never "offered a credit such as this to AT&T."[20]

With regard to agreements made public between Qwest and Covad and other "Small CLECs," AT&T's representative has made clear that AT&T would have been interested in the service terms that required Qwest "to deliver 90% of Covad's FOCs within 48 hours of delivery

---

[15] *See* Testimony of Michael Hydock, District Manager, AT&T, Local Services and Access Management Organization, MDOC Complaint, Exhibit 202 (April 22, 2002).
[16] *Id.* at 3.
[17] *Id.* at 4.
[18] *Id.* at 7.
[19] *Id.* at 9. Qwest therefore secretly granted Eschelon "credits for every line for every month" in a manner that was "discriminatory to AT&T *and* every other CLEC." *Id.* at 10 (*emphasis in original*).
[20] *Id.* at 10.

of an accurate LSR," without loop conditioning activity "of any sort," as well as terms for line sharing service that "are more favorable than the published service interval guide."[21] AT&T would also have been interested in the favorable term afforded to the "Small CLECs," which allowed them to adopt any voluntary term agreed to by Qwest anywhere in its operating territory, because traditionally "Qwest has limited AT&T to pursuing adoption of agreements on a state-by-state basis."[22]

In the current phase of the proceedings, moreover, the MDOC has provided evidence that Qwest has additional oral agreements that further discriminate between certain favored CLECs and other CLECs.[23] Specifically, Qwest and McLeod apparently entered into oral agreements whereby "Qwest would provide discounts to McLeod for all purchases made by McLeod from Qwest;" these discounts "ranged from 6.5% to 10% depending on the volume of purchases made" by McLeod.[24] The MDOC's investigation revealed that Qwest did not want to put the discounts in writing, and was "concerned that other CLECs might feel entitled to the same discount if the agreement were written and made public."[25]

In addition to the disturbing picture that is finally emerging about the nature and extent of the discriminatory arrangements themselves, there is mounting evidence that these arrangements tainted the testing data on which Qwest relies to demonstrate that it provides effective and nondiscriminatory access to OSS.[26] Because it has precluded the emergence of significant competition and as a result there is insufficient commercial experience in the applicant states,

[21] *Id.* at 11-12.
[22] *Id.* at 12.
[23] *See*, *e.g.*, Supplemental Testimony of W. Clay Deanhardt, July 24, 2002. The current proceedings before the MPUC are being undertaken confidentially under seal. The report provided here is based on the redacted version of Mr. Deanhardt's testimony.
[24] *Id.* at 2, 9.
[25] *Id.* at 8-9.

Qwest has relied almost entirely upon the results of third-party testing data to meet its burden of demonstrating that its provision of access to OSS meets the Commission's standards under Section 271. To test Qwest's performance with respect to activities that require dispatch of a Qwest technician, for example, KPMG observed Qwest's performance with respect to specific CLECs. As AT&T demonstrated in its comments on Qwest's applications, KPMG's findings were based, on information and data that KPMG obtained from CLECs like McLeod, Eschelon and Covad that were receiving preferential treatment from Qwest, and therefore may not be relied upon to demonstrate acceptable general performance by Qwest for all CLECs.[27]

Significantly, KPMG has acknowledged that some of the findings and conclusions in its report were based, in whole or in part, on information and data obtained from "secret deal" CLECs. In its report issued May 7, 2002, KPMG identified a number of tests on which it had relied, either substantially or in part, on information from at least three "secret deal" CLECs.[28] In identifying these tests, which covered every OSS function, from pre-ordering to maintenance and repair, KPMG stated that it "makes no assertion as to whether or not the information received from the three CLECs is representative of the 'typical' CLEC experience, given the preferential treatment the three CLECs may have received from Qwest."[29] One month later, after additional "secret deal" CLECs were discovered and disclosed, KPMG issued a supplemental report which reiterated that "in our original [KPMG May 2002 Report], KPMG Consulting made no assertion as to whether or not the information received from the three CLECs is representative of the 'typical' CLEC experience," and continued on to "affirm that statement."[30]

---

[26] This issue is explored in greater detail in AT&T's Ex Parte submission regarding Qwest's secret deals. *See* Letter from Mark D. Schneider to Ms. Marlene H. Dortch, WC Docket Nos. 02-148 and 02-189, at 8-10 (August 16, 2002).

[27] *See* Joint Declaration of John F. Finnegan, Timothy M. Connolly, and Mitchell H. Menezes at 9-11.

[28] *Id*. at 10 and Attachment 2 (KPMG May 2002 Report).

[29] *Id*. at Attachment 2.

[30] *Id.* at Attachment 3 (KPMG June 11, 2002 Report).

Because the burden is on Qwest to demonstrate the effectiveness and nondiscriminatory nature of its OSS performance, these statements by KPMG alone are sufficient to prove unreliable the tests that relied in whole or in significant part on performance observation or data that came from the favored CLECs. Nevertheless, the reliability of the tests is further called into question by the fact that KPMG relied extensively on McLeod for unbundled loop and UNE-P observations, Eschelon for UNE-P observations, and Covad for DSL observations. Where KPMG relied to a material extent on these "secret deal" CLECs, the concern that the performance that was measured was superior to the results that would have been observed for a less-favored CLEC is obvious. Installation or repair of service logically would be benefited by the attentiveness of specific Qwest personnel that were provided to certain CLECs as part of their private favorable arrangements. Particularly favorable timing commitments that were privately provided to certain CLECs logically would produce an incentive to meet those commitments, unlike the incentive that exists with "typical" CLECs subject to more standard arrangements. As one example, when Qwest's initial UNE-P offering to these CLECs broke down, Qwest provided Eschelon and McLeod a provisioning arrangement known as "UNE-Star," which is easier for Qwest to provision (since UNE-Star is essentially resold POTS service). Because Qwest's UNE-Star provisioning performance was lumped together with its UNE-P performance in the KPMG test, Qwest's UNE-P performance measures likely are overstated. It is for these very reasons that KPMG felt the need to qualify its reports on the representative nature of tests involving "secret deal" CLECs.

B. The Secret Deals Foreclose Any Finding That Qwest Has Met Its Checklist Or Public Interest Burdens.

Qwest's ongoing secret deals discrimination is fatal to its Application. As several commenters point out, the secret agreements, which blatantly favor some CLECs over others, are a patent violation of Qwest's obligation to provide "access" to its network facilities on terms and conditions that are "nondiscriminatory," 47 U.S.C. § 271(c)(2)(B)(ii), and likewise of the other checklist items that require nondiscrimination.[31]

DOJ acknowledged that the allegations of discrimination are "serious and deserve the Commission's careful attention." in its evaluation of Qwest's first multi-state 271 Application,[32] which it incorporated by reference in its entirety in its evaluation of Qwest's instant Application.[33] DOJ nevertheless concluded that "such allegations of past discrimination do not appear to implicate the Department's inquiry into whether local exchange markets are fully and irreversibly open to competition for purposes of providing its Evaluation of a pending Section 271 application to the Commission."[34] That conclusion simply ignores the mounting evidence that Qwest's discrimination is *ongoing*, not a *past* practice that has terminated. The state investigations are in progress and there is no basis to assert that Qwest has ceased entering into or performing under discriminatory agreements. If – as is clearly the case – Qwest continues to discriminate in the provision of interconnection and access to network elements, there is plainly no basis for a Commission finding that Qwest is presently offering interconnection and access to network elements on a *non*discriminatory basis.

As AT&T demonstrated in its comments,[35] and no commenter has refuted, any suggestion that the Commission can ignore Qwest's discrimination in this proceeding and, instead, address it "through dockets in which such matters are directly under investigation," flies

---

[31] *See* Pilgrim Telephone Comments at 11 (Qwest's "special deals, by their very nature, are not available to all competitive carriers under Qwest's interconnection agreements. Therefore, Qwest is not providing non-discriminatory access to its network elements, and thus has failed to comply with the Section 271 checklist requirements"); Touch America Comments at 29 (Qwest's secret agreements "hav[e] an anticompetitive and discriminatory impact on competitive carrier operations").

[32] DOJ Eval. (Qwest I) at 3.

[33] DOJ Eval. (Qwest II) at 1 n.2.

[34] DOJ Eval. (Qwest I) at 3-4.

in the face of section 271.[36] The fundamental purpose of the section 271 approval process is for the Commission to consider precisely these issues. Accordingly, the Commission has a statutory obligation to address the allegations in *this* proceeding, and cannot grant the joint application with respect to *any* state unless it concludes that Qwest currently is satisfying all checklist obligations.

Several commenters agree that Qwest's secret deals discrimination precludes approval of its section 271 Applications because the regulatory records, before both state commissions and this Commission, are unreliable.[37] Significantly, DOJ has acknowledged the "questions as to the quality of the record," noting that "[p]erformance data relating to the CLECs that are alleged to have received preferential treatment are included in the aggregate data included in Qwest's filing and were relied upon by KPMG" during portions of the OSS test.[38] DOJ has further acknowledged that "[t]he three-year process [of gathering performance data] might well have been more efficient and comprehensive with the full and open participation of all interested CLECs."[39] Despite these acknowledgements, however, DOJ concluded that "the fact that certain CLECs did not participate does not appear to have had a significant impact on the result."[40] This conclusion is wholly unsubstantiated. Indeed, it could not be substantiated because DOJ cannot know what the CLECs who were bought off *would have contributed to the record* if they had not

---

[35] AT&T at 25 n.42.

[36] DOJ Eval. (Qwest I) at 3.

[37] Pilgrim Telephone Comments at 14-15 ("The conclusion is inescapable that Qwest has manipulated the Section 271 review process by arranging to keep competitive LECs from participating in the process, and that this manipulation has had the effect of undermining the ability of the Commission and state regulatory commissions to make reasoned and fact-supported judgments about Qwest's compliance with Section 271 requirements"); Touch America Comments at 29 ("the secret CLEC agreements have denied the states and the Commission the opportunity to develop a full and complete record for reviewing Qwest's requests for 271 authority").

[38] DOJ Eval. (Qwest I) at 4.

[39] *Id.* at 5.

[40] *Id.*

been silenced or how much Qwest's special treatment of its secret deals partners skewed the performance and other data.[41]

DOJ has also asserted that "any enhanced performance caused by the allegedly preferential treatment will have resulted in higher benchmarks for Qwest to maintain."[42] As a preliminary matter, it is not clear that the tainted data from the secret deal CLECs will result in "higher" future benchmarks. But even if they would, DOJ's assertion misses the point. The relevant inquiry is whether Qwest currently is providing CLECs with access to OSS that is comparable to that which Qwest provides itself. The extent to which current (and past) flawed tests may impact *future* tests – after Qwest has obtain § 271-approval – is beside the point. The fundamental purpose of section 271 is to prevent Qwest from entering the long-distance market in the first place unless and until Qwest meets its burden of satisfying all checklist requirements, which it cannot do if the record of its current performance is unreliable. If the Commission were to prematurely approve the joint application on the basis of skewed or inaccurate performance data – and in the process send a message to the industry that section 271 application will be approved notwithstanding such misconduct – then "higher" benchmarks would be of little use in preventing Qwest (or, for that matter any RBOC) from exercising monopoly power in the long-distance market. The bottom line is this: it is undisputed that Qwest has been – and is – discriminating, and there is no rational basis for the Commission to conclude that this discrimination is immaterial or that Qwest has met its checklist burdens despite that discrimination.

[41] Commenters agree with AT&T that the burden is on Qwest to prove that its pervasive discrimination had no material impact on the performance data and state commission findings upon which it attempts to rely, and that Qwest has not even attempted to meet this burden. *See* AT&T Comments at 28; Pilgrim Telephone Comments at 12 ("In order to prove its contention that OSS is available on a non-discriminatory basis, Qwest has the burden of demonstrating that the test data has not been contaminated by Qwest's secret deals. Qwest has not met this burden").

Finally, no commenter, including DOJ, disputes that Qwest's failure to fully disclose the nature of its secret deals violates Commission Rule 1.17.[43]

II. QWEST DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

The comments confirm that Qwest fails to provide an adequate change management process, a stable test environment that mirrors (but is separate from) the production environment, and the same access to OSS functions as that enjoyed by its own retail operations.[44] The Department of Justice, for example, states that it "cannot support [Qwest's] application as filed," because "Qwest's assertions that it provides adequate manual order processing and electronically auditable billing for UNE-platform service remain questionable."[45]

Remarkably, even the statements of some of the state regulatory commissions that have blessed Qwest's OSS demonstrate that Qwest is *not* currently meeting those obligations. All too often, however, the state commissions excuse discrimination and poor performance by Qwest, either by asserting that they will monitor Qwest's performance in the future or by citing to the current (or possible) inclusion of certain performance metrics in Qwest's performance assurance plans to ensure that Qwest will meet its obligations in the future.[46] These rationalizations are simply irrelevant to the issue of whether – as Qwest must establish – Qwest is *currently* in compliance with its OSS obligations.[47]

---

[42] DOJ Eval. (Qwest I) at 5.

[43] See AT&T at 29-30.

[44] *See* AT&T at 30-47; Covad at 16-52; Eschelon at 6-16, 18-19, 22-31, 35-39; Touch America at 4-5, 19; WorldCom at 1-26.

[45] DOJ Eval. (Qwest II) at 2-3, 21.

[46] *See, e.g.,* Montana PSC at 21-23; Washington UTC 39th Supplemental Order issued July 1, 2002, in WUTC Docket Nos. UT-003022 and UT-003040 ("WUTC 39th Supp. Order"), ¶¶ 36, 83. To the extent that the bases offered by the State commissions for their finding that Qwest meets its OSS obligations are the same as those advanced by Qwest in its Application, they have already been addressed by AT&T in its opening comments, and will not be addressed here.

[47] *See, e.g., Michigan 271 Order* ¶¶ 55, 179 (BOC's promises of future compliance are irrelevant to issue of whether BOC is currently in compliance with Section 271).

The comments also show that third-party testing of Qwest's OSS by KPMG Consulting ("KPMG") is of no real-world value because the results were based on input from CLECs which received preferential secret deals treatment from Qwest that is not available to other carriers.[48] The KPMG test results thus clearly overstate Qwest's actual performance.[49] Moreover, the state commissions that claim that the KPMG test shows that Qwest is providing nondiscriminatory access ignore KPMG's own disclaimer that it could make no such determination.[50] In any event, "KPMG continued to deem Qwest's performance unsatisfactory with respect to a number of important issues," and the KPMG test "ended with a number of important issues unresolved because Qwest unilaterally determined that certain issues should not be retested."[51] There is no basis on this record for a Commission finding that Qwest has met its OSS burden.

---

[48] AT&T at 31; Pilgrim at 3, 11-12. Even though its "CLEC participation study" focused on only three of the CLECs who received preferential treatment from Qwest, KPMG acknowledged that some of the findings and conclusions in its Final Report were based, at least in part, on information and data obtained from these CLECs. *See* AT&T at 31 & Finnegan/Connolly/Menezes Decl. ¶¶ 16-17 & Atts. 2-3. Moreover, KPMG acknowledged that it had not audited the accuracy and completeness of the data received from these CLECs, had not investigated whether such data were consistent with data held by other CLECs, and had not reviewed any of the secret agreements. *Id.* KPMG nonetheless declined to determine the precise impact of the secret agreements on the test results, despite AT&T's express request that it do so. AT&T at 31 & Finnegan/Connolly/Menezes Decl. ¶ 18 & Atts. 4-6.

[49] The Washington UTC declined to address the issue of the effect of the secret agreements on the results of KPMG test, on the ground that no party had filed a complaint claiming that Qwest or any other party acted improperly in entering into the secret agreements. WUTC 39th Supp. Order, ¶ 218. The WUTC's reasoning is untenable. As the WUTC admits, the issue *was* raised in its Section 271 proceeding by CLECs. *Id.*, ¶ 217. Because "the persuasiveness of a third-party review [of the OSS] is dependent on the conditions and scope of the review" (*New York 271 Order* ¶ 100), the WUTC could not properly determine whether the results of the KPMG test supported a conclusion that Qwest was providing nondiscriminatory access to its OSS without considering whether the preferential treatment given under these agreements skewed the results of the test.. *See* WUTC 39th Supp. Order, ¶ 110.

[50] *See* WUTC 39th Supp. Order, ¶ 110 (finding that, where KPMG found test criteria to be satisfied, "Qwest provides the OSS function in a nondiscriminatory manner"); Utah PSC's Final Order Regarding Qwest § 271 Compliance, issued July 8, 2002, in Utah PSC Docket No. 00-049-08, *In the Mater of Qwest Corporation for Approval of Compliance with 47 U.S.C. § 271(d)(2)(B)* ("Utah PSC Final Order") at 5 (noting that KPMG filed its draft report, stating that the Utah PSC is relying on data in report in determining issue of Qwest's compliance with Section 271, and concluding that Qwest meets its checklist obligations); AT&T Finnegan/Connolly/Menezes Decl. ¶ 15.

[51] WorldCom at 4. *See also* AT&T at 31-32.

A. Qwest Has Neither Established, Nor Adhered To, an Adequate Change Management Process.

The comments confirm that Qwest's change management process ("CMP") is inadequate under the standards established by the Commission. First, Qwest has not established that it has "adhered to this process over time."[52] Second, Qwest has not met the Commission's requirement that it establish a stable testing environment that mirrors, but is separate from, the production environment.[53] Because an adequate change management process is essential to the development of effective competition, these deficiencies in Qwest's CMP, by themselves, require denial of the Application.[54]

Failure to Demonstrate Adherence to an Adequate Change Management Process. As KPMG's Final Report confirmed, many of the provisions of Qwest's "redesigned" CMP are too recent, or not yet mature enough, to evaluate.[55] Qwest's application provided no hard evidence of its compliance with its "redesigned" CMP, but simply discussed the percentage of administrative "milestones" that it has met.[56] The state commissions' discussions of the issue of CMP compliance are similarly cursory and unaccompanied by any reliable basis or evidence to support their recommendations. For example, the Montana PSC simply states, without elaboration, that "Qwest's redesigned CMP complies with the FCC's expectations" and that its "record of compliance is likely to continue when the new CMP components are implemented."[57] The Wyoming PSC states that "Qwest has achieved 99% total compliance" with the redesigned CMP on the basis of "six months of experience with [its] core provisions," but offers no further

[52] *New Jersey 271 Order*, App. C ¶ 40; *Georgia/Louisiana 271 Order*, App. D ¶ 40; *Texas 271 Order* ¶ 106; *New York 271 Order* ¶ 102.

[53] *New Jersey 271 Order*, App. C ¶ 42; *New York 271 Order* ¶¶ 109-110.

[54] *See, e.g., New Jersey 271 Order*, App. C ¶ 41 ("Change management problems can impair a competing carrier's ability to obtain nondiscriminatory access to UNEs, and hence a BOC's compliance with section 271(2)(B)(ii)").

[55] AT&T at 32-35; Eschelon at 42-43; WorldCom at 21-22.

[56] AT&T at 33-34.

explanation.[58] In support of its finding that Qwest has sufficiently adhered to the CMP, the Washington UTC states only that Qwest has "sufficiently adhered to its redesigned process."[59]

Given the findings of both KPMG and Cap Gemini in their third-party testing that the CMP is too new to determine whether Qwest had established a pattern of compliance, it is clearly "too early to conclude that Qwest is complying with the redesigned process." [60]

Inadequate Test Environment. The comments likewise confirm that neither of Qwest's testing environments meets the requirement that a BOC provide a stable testing environment that mirrors the production environment and is physically separate from it.[61] Qwest's "Interoperability Environment" is not separate from the production environment because it uses actual production systems, and fails to mirror the production environment because it returns all responses to CLEC transactions manually, regardless of whether they are returned in automated form in actual production.[62]

---

[57] Montana PSC at 23.

[58] Wyoming PSC at 6; Wyoming PSC Order on Consideration of General Compliance, issued July 3, 2002, in Wyoming PSC Docket No. 70000-TA-00-599 (Record No. 5924), ¶ 38 ("Wyoming PSC Compliance Order"). The Wyoming PSC's suggestion that the "core provisions" of the CMP have been in effect for at least six months is flatly contrary to the evidence, which shows that many of these provisions were adopted and implemented only in recent months. AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 36-39.

[59] Washington UTC at 14-15. In its 39th Supplemental Order issued last month, the Washington UTC found Qwest in compliance with the "systems" CMP on the basis of previous Commission decisions approving Section 271 applications even though the BOC had not met certain notification intervals, Qwest's efforts to release notification processes, and Qwest's recent revisions to the PID PO-16. WTUC 39th Supplemental Order ¶ 200. The Washington UTC, however, overlooked the fact that – in contrast to Qwest – previous Section 271 applicants who received approval had CMPs that were complete, and in effect, well before they filed their applications. Finnegan/Connolly/Menezes Decl. ¶ 38 & n.27.

[60] Eschelon at 43. *See also* AT&T at 33; WorldCom at 21-22 & Lichtenberg Decl. ¶¶ 98-99.

[61] AT&T at 36-39; WorldCom at 23-26; *Georgia/Louisiana 271 Order* ¶ 187; *Texas 271 Order* ¶ 32.

[62] AT&T at 36; WorldCom at 23-24. In addition, CLECs can use the Interoperability Environment only to the extent that they submit actual production accounts. WorldCom at 23-24; AT&T Finnegan/Connolly/Menezes Decl. ¶ 83.

SATE, Qwest's alternative test environment, is unstable, because SATE releases may differ from those actually implemented in production.[63] Moreover, SATE does not mirror the production environment. First, the responses returned to CLECs may differ from those received in actual production.[64] Second, in contrast to their experience in actual production, CLECs using SATE must choose a "path" for the response that will determine the time within which it will be returned.[65]

Third, SATE does not support many of the products that Qwest actually makes available in the production environment, and requires CLECs (like AT&T) which seek the inclusion of additional products in SATE to follow the time-consuming procedure of submitting a change request. For example, an evaluation that Hewlett-Packard conducted in connection with the third-party testing of Qwest's OSS in Arizona found that SATE Release 8.0 supported only 34 (or 47.5 percent) of the 80 products that Qwest offered.[66] Qwest has not implemented either of the two change requests that AT&T submitted in December 2001, or any of the nine change requests that Qwest itself submitted in early 2002, for the inclusion of additional products in SATE (and did not subsequently withdraw).[67]

These failures of SATE to mirror actual production resulted in KPMG's issuance of two exceptions that it closed as "unresolved" and in KPMG's conclusion in its Final Report that Qwest did not make available a "functional test environment" to CLECs.[68] More importantly,

---

[63] AT&T at 36.
[64] *Id.* at 37.
[65] *Id.*
[66] *See id.* at 36-37 & Finnegan/Connolly/Menezes Decl., ¶¶ 90-92.
[67] AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 93-94.
[68] AT&T at 37; WorldCom at 21-23.

given these deficiencies, SATE clearly does not satisfy the Commission's requirement that it "perform the same key functions" as the production environment.[69]

Qwest's recent *ex parte* letters to the Commission regarding SATE provide further confirmation that SATE fails to mirror the production environment. One table that Qwest included in these *ex partes* shows "an approximately 22% variance in the error messages coded into SATE with those in production"[70] Furthermore, Qwest's submission shows that SATE covers only 13.43 percent of the total legacy system error messages that have been encountered in production.[71]

The omission of so many errors, and error messages, from SATE is flatly inconsistent with Qwest's own description of the purpose of interface testing – "to ensure CLECs that their systems will be able to receive and display error messages and other responses, such as FOCs."[72] Because so many responses are *not* coded in SATE, CLECs have no assurance that the error messages that they receive in SATE will be the same as those received in production. In fact, the examples that Qwest's application offers of differences in SATE responses and production responses confirm that the content of the responses can be, and are, dramatically different.[73] In each of these examples, the SATE error message returned would also be returned for other encountered error conditions, and CLECs do not know which error condition has actually been encountered.

Qwest has attempted to explain away these differences by asserting that the "structure," not the content, of the response is important to CLECs, and that a CLEC using SATE is

---

[69] *Texas 271 Order* ¶ 138.

[70] *See, e.g., Ex Parte* Letter from Hance Haney (Qwest) to Marlene H. Dortch, WC Docket No. 02-148 (table) (filed July 15, 2002); WorldCom Lichtenberg Decl. ¶ 111; *see also* AT&T Finnegan/Connolly/Menezes Decl. ¶ 109 & Atts. 22-23.

[71] AT&T Finnegan/Connolly/Menezes Decl. ¶ 109.

[72] *Id.* ¶ 110; Notarianni/Doherty Decl. ¶ 720.

concerned only whether the CLEC "can receive and display the error message," irrespective of the contents of that message. This argument, however, is flatly contrary to reality and common sense.[74] Unless the content of the SATE message is the same as that of the message it receives in production, the CLEC has no assurance that the transaction it receives in SATE will have the same experience in commercial production – or how the CLEC should respond to Qwest's message or which actual error condition has occurred. Moreover, if the responses received in SATE differ from those in actual production, CLECs will be unable to develop software of their own that analyzes the content of error codes and prompt for responses (either by its electronic systems or by CLEC representatives) error messages in actual production. Similarly, because of the different content of SATE responses and production responses, CLECs evaluating a new version of an interface "have no way of knowing whether they will receive the same response in production and whether they should revise their systems, ask Qwest to revise its systems, or conclude that there is no need for any changes."[75] In short, the specificity and content of the message received in SATE, and the extent to which that content mirrors production, is critical to a CLEC's ability to compete.

Finally, although the State commissions that address the issue conclude that the test environments offered by Qwest are adequate, their comments do not support their findings. The Washington UTC, in fact, acknowledges that it is "concerned about the problems that KPMG has identified in the Interop and SATE environments," but rationalizes that "Qwest has made efforts to address the issues for the SATE environment."[76] The Wyoming PSC cites Qwest's

---

[73] AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 110-112.

[74] AT&T at 38 & Finnegan/Connolly/Menezes Decl. ¶¶ 109-114; Notariani/Doherty Decl. ¶ 724.

[75] WorldCom at 24; *see also* AT&T at 38 Finnegan/Connolly/Menezes Decl. ¶¶ 108-114.

[76] WUTC 39th Supp. Order, ¶ 214. The WUTC also suggests that SATE is adequate because Qwest "has addressed and will continue to address the issue of products supported by SATE through the change management process, which is an appropriate place to discuss changes to an OSS system." *Id.* The WUTC's reasoning overlooks not

performance under the PID PO-19 and the use of SATE by ten CLECs, without even considering the problems identified by KPMG (or the inadequacies of the PO-19 measure).[77]

B. Qwest's Interfaces Fail To Provide Nondiscriminatory Access.

The comments confirm that Qwest's interfaces do not provide CLECs with access to OSS functions that is equivalent to that which Qwest provides its retail operations.

Pre-Ordering. Qwest fails to provide nondiscriminatory access to pre-ordering in numerous respects. *First*, Qwest has not provided CLECs with the ability to integrate EDI pre-ordering and ordering functions successfully. For example, even though MCI has attempted to integrate its EDI interfaces, Qwest still rejects more than 30 percent of MCI's orders – showing that successful integration remains "out of reach."[78]

AT&T has also encountered substantial integration difficulties.[79] Qwest has grouped information in the service and equipment section of its parsed CSR based on the universal service ordering codes ("USOCs") for the various products and services ordered by the customer (unlike other RBOCs, which group such information by the end-user's telephone number). As a result of Quest's design, any benefits that might be derived from using the parsed CSR are nullified by the substantial time and resources that a CLEC would be required to devote to searching for the correct telephone number and line-related features – particularly where, as in AT&T's case, the CLEC intends to offer local exchange service on a mass-market basis.[80]

---

only the cumbersome nature of the change request process as a means of adding products to SATE (a deficiency noted by KPMG in its testing), but also the fact that SATE cannot mirror the production environment when it fails to support the same universe of products as that environment. Finnegan/Connolly/Menezes Decl. ¶¶ 90-94.

[77] Wyoming PSC General Compliance Order ¶ 37; Finnegan/Connolly/Menezes Decl. ¶ 115- n.78. Although the Wyoming PSC acknowledges elsewhere in its order that "some unresolved observations and exceptions in the testing process clearly point to the need for an ongoing Commission role in the process," it does not discuss the exceptions that KPMG issued regarding the inadequacy of SATE. Wyoming PSC General Compliance Order ¶ 35b.

[78] *See* WorldCom Lichtenberg Decl. ¶ 32; AT&T at 39-40.

[79] *See* AT&T at 40 & Finnegan/Connolly/Menezes Decl. ¶¶ 136-138.

[80] *Id.*

The DOJ finds that although a "less complicated organization [of the parsed CSR] may be preferable for use in AT&T's own systems," Qwest's current parsed CSR "does not appear to preclude full and successful integration of pre-order and order functions for all CLECs."[81] However, the bases that DOJ cites for its conclusion– letters from Telcordia and Nightfire, integration by Hewlett-Packard, and integration performed by New Access – do not show that Qwest has given *CLECs* the ability to fully and successfully integrate these functions. HP, Telcordia, and Nightfire are not CLECs, but are companies with extensive expertise in highly technical computer systems projects.[82] HP's own report on its integration testing during the ROC test makes clear that CLECs could only hope to achieve full and successful integration by employing a variety of outside systems analysts, programmers and developers – and, even with those resources, the prospects of success would be dubious.[83]

Indeed, the only evidence of actual CLEC experience shows that Qwest has not enabled CLECs to achieve full and successful integration. As previously described, both AT&T and WorldCom have shown that they have been unable to achieve such integration. The experience of New Access also lends no support to Qwest's position that it has complied with its obligations. New Access, for example, has not attempted to use the service and equipment section of Qwest's CSR, since New Access only uses the EDI interface to submit suspend/restore

[81] DOJ Eval. (Qwest II) at 11 & n.47.

[82] *See* Finnegan/Connolly/Menezes Decl. ¶ 133; Application at 123 (describing Telcordia and Nightfire as companies that "design and construct EDI interfaces for CLECs"). Thus, even if "high-tech" companies such as Telcordia and Nightfire have been able to use their expertise to develop software that integrates pre-ordering and ordering functions and have made that technology for sale to certain CLECs, that fact does not excuse Qwest from its obligation to provide *CLECs* directly with the capability to achieve such integration themselves.

[83] Finnegan/Connolly/Menezes Decl. ¶¶ 134-135. As WorldCom points out, in its separate integration testing in Arizona, HP found hundreds of inconsistencies between pre-order and order requirements and other problems that, while not "critical enough" to prevent "an established CLEC, with a professional EDI development team" from building a pre-order/order integration system, such problems "could present a CLEC with many challenges." WorldCom Lichtenberg Decl. ¶ 31 (quoting HP report).

or disconnect orders – which require no information from that section.[84] Moreover, New Access required more than one and one-half years to develop the limited integration capability that it has managed to achieve – and achieved that capability only in June, which is too recent for the Commission to conclude that the capability is successful, particularly since New Access appears to submit relatively low volumes of orders.[85]

In addition to its failure to enable CLECs to integrate pre-ordering and ordering functions successfully, Qwest has failed to meet its obligation to enable CLECs to integrate pre-ordering interfaces successfully with their own back-office systems.[86] As AT&T has previously described, CLECs using the EDI pre-ordering interface experience order rejections because the service address information in the "CRIS" database that supplies the service address information used by CLECs on migration orders frequently do not match the information in the PREMIS database used by Qwest to validate addresses. This impediment to integration appears to be unique to Qwest's systems.[87] Because of this deficiency in Qwest's systems, "mismatches," AT&T has generally been faced with the choice of either experiencing frequent order rejections or obtaining address information based on telephone number ("TNAVQ") for migration orders by using the address validation function of Qwest's GUI interface, where the address is validated

[84] Finnegan/Connolly/Menezes Decl. ¶ 133 n.87.

[85] *See id;* WorldCom Lichtenberg Decl. ¶ 38; *ex parte* letter from Sumeet Seam (Qwest) to Marlene H. Dortch in WC Docket No. 02-148, dated July 29, 2002, Attachment at 1.. To the best of AT&T's knowledge, the only pre-ordering functions used by New Access are the address validation function and retrieval of a customer service record for certain purposes (not involving the S&E section of the CSR). Finnegan/Connolly/Menezes Decl. ¶ 133 n.87; *ex parte* letter from Linda L. Oliver (Qwest) to Marlene H. Dortch in WC Docket No. 02-148, dated August 8, 2002, Attachment 1 (e-mail from New Access to Qwest).

[86] The Commission has stated that "in order to demonstrate compliance with checklist item 2, the BOC must enable competing carriers to transfer pre-ordering information (such as a customer's address or existing features) electronically into the carrier's own back office systems and back into the BOC's ordering interface." *Texas 271 Order* ¶ 152. *See also Georgia/Louisiana 271 Order* ¶ 119.

[87] AT&T at 40-41 & Finnegan/Connolly/Menezes Decl. ¶¶ 138-140. The rejections caused by such "mismatches" do not occur in the regions served by Verizon (which has ensured that the address information in its databases are identical) and by SWBT (which has programmed its systems to process an order as long as the address information

using the PREMIS database.[88] However, the use of the GUI (which is not integratable with a CLEC's back-office systems) requires AT&T to enter the order twice – once into the LSR and once into AT&T's own systems – in order for AT&T to store the data in its own systems.[89] This "double data entry" is a denial of parity, because it increases the likelihood that the CLECs will experience additional costs, delays, and human errors not experienced by Qwest's retail operations, which use fully integrated systems.[90]

Second, Qwest has not shown that it provides CLECs with nondiscriminatory access to the same loop qualification information that is available to Qwest itself.[91] The "loop qualification tools" that Qwest provides to CLECs suffer from "numerous and severe deficiencies."[92] Information derived from these "tools" is often inaccurate or incomplete – indicating that, in violation of this Commission's requirements, Qwest is "filtering" data from the databases to which it has access.[93]

---

derived from the CSR is a "near-match" to the information in its database that validates address information on the LSR). Finnegan/Connolly/Menezes Decl. ¶ 140.

[88] AT&T at 40-41 & Finnegan/Connolly/Menezes Decl. ¶ 141.

[89] In a recent *ex parte*, Qwest asserts that the use of the GUI for address validation "does not require re-typing the entire order," but "simply requires AT&T to use the validated address from the IMA-GUI in the AT&T ordering OSS for subsequent LSR submission via IMA-EDI." *See ex parte* regarding address validation from Hance Haney (Qwest) to Marlene H. Dortch, dated August 8, 2002, in WC Docket Nos. 02-148 and 02-189, at 2. Qwest's suggested approach, however, would still require AT&T to re-key the address information obtained from the GUI interface into the LSR on the EDI ordering interface, since the GUI and EDI interfaces are not integratable. Full and successful integration requires that AT&T be able to populate such information electronically into the LSR, without the need for manual intervention.

[90] *See, e.g.,* Finnegan/Connolly/Menezes Decl. ¶ 141; *Second Louisiana 271 Order* ¶ 96.

[91] *See* AT&T at 41; Covad at 23-30; WorldCom at 26-27.

[92] Covad at 31.

[93] Covad at 31-33; WorldCom at 26-27 (describing MCI's receipt of responses which state that fiber exists in a particular loop, but fail to advise that spare facilities are available, notwithstanding Qwest's claim that its database contains information concerning spare copper facilities). Qwest itself has admitted that the information that CLECs receive via the Raw Loop Data tool may be inaccurate or incomplete. *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 144.

Third, Qwest has not provided CLECs with the ability to perform (or have performed) mechanized loop testing ("MLT") before actual provisioning.[94] Qwest's refusal to do so severely impairs CLEC's opportunity to compete, because an MLT is necessary in order to verify the accuracy of the loop qualification information that Qwest provides.[95] Qwest's policy is a denial of parity, since Qwest has performed pre-order MLTs in its retail operations.[96]

Finally, the comments show that Qwest denies nondiscriminatory access to pre-ordering functions because it changes due dates for CLEC orders far more frequently than for its own retail orders. As the Washington UTC found, Qwest's reported data "show a statistically significant difference between the average number of days of due-date changes for CLECs compared to Qwest's retail customers."[97] The higher rate of postponed installations results in customer dissatisfaction (blamed on the CLEC) and requires the CLECs to expend additional

---

[94] *See* AT&T at 41 & Finnegan/Connolly/Menezes Decl. ¶¶ 149-155; Covad at 30-38.

[95] AT&T at 41 n.101; Covad at 31-33.

[96] *See* AT&T Finnegan/Connolly/Menezes Decl. ¶ 153; Covad at 36-37. In March 2002, the Utah PSC required Qwest to provide pre-order MLTs in view of the evidence that Qwest had undertaken "a general program of performing MLTs on a routine basis at the beginning of its DSL rollout," demonstrating a "disparity between the CLECs' options and those Qwest retains for itself." Order issued March 26, 2002, in Utah PSC Docket No. 00-049-08, at 11. One month later, however, the Utah PSC reversed its decision after Qwest proposed a manual process for requesting loop qualification information as an alternative. Utah PSC Compliance Order at 3-4. The Utah PSC's decision that the MLT was rendered unnecessary by the availability of a manual process was incorrect, since the MLT is needed to confirm the accuracy of the loop qualification information that Qwest provides, whether electronically or manually. Moreover, because Qwest implemented the manual process only recently, Qwest cannot show that it is effective. Finnegan/Connolly/Menezes Decl. ¶ 155 n.104. The failure of the Utah PSC to order pre-order MLTs only compounds the error of its earlier ruling that Qwest was not required to grant CLECs direct access to its LFACS database. The Utah PSC declined to require such access on the basis of Qwest's claim that it had modified its loop qualification tools to include information regarding spare facilities – even though the evidence demonstrates that the tools do not include all of the loop qualification information available to Qwest itself. Utah PSC March 26 Order at 11; Finnegan/Connolly/Menezes Decl. ¶¶ 144-145.

[97] *See* WUTC 39th Supp. Order ¶ 85. Despite this finding, the Washington UTC declined to find that the disparity constituted a violation of the checklist because the PID for due changes is merely "diagnostic." *Id.* The classification of a metric as "diagnostic," however, simply means that the decision as to whether Qwest's performance in that area violates the Act to be made by the hands of the appropriate regulatory agency. Such a classification does not relieve the agency of its obligation to make that decision.

resources to determine the actual delivery date and to "mend damaged customer relationships."[98]

Ordering and Provisioning. The comments also confirm that Qwest fails to provide nondiscriminatory access to ordering and provisioning functions. First, Qwest's systems are plagued by high-rates of order rejections, manual processing of electronically submitted CLEC orders, and manual errors.[99] Qwest's systems, for example, reject approximately one-third of orders submitted by CLECs using the electronic Qwest interfaces – a rate that DOJ correctly describes as "high."[100] Qwest's rejection rates in June 2002 not only increased from those in May, but represented the highest monthly levels reported for this year.[101]

Qwest cannot simply attribute these rates to "CLEC errors." As DOJ points out, Qwest increases the likelihood of order rejections because (unlike other RBOCs) it does not offer

[98] AT&T at 41 & Finnegan/Connolly/Menezes Decl. ¶ 158; Covad at 39-40. *See also* DOJ Eval. (Qwest I) at 20 (noting that "due date changes on wholesale orders have exceeded the number of due date changes on retail orders," which suggests that "further analysis is warranted"); DOJ Eval. (Qwest II) at 1 n.2 (stating that DOJ's evaluation of the *Qwest II* application incorporates by reference all of DOJ's evaluation in *Qwest I*). In a recent *ex parte*, Qwest presented an "analysis" purporting to showing that "Qwest was initiating due date delays on retail orders more frequently than on wholesale orders." *See ex parte* letter from Hance Haney (Qwest) to Marlene H. Dortch in WC Docket Nos. 02-148 and 02-169, dated August 8, 2002, at 6 ("Qwest August 8 *ex parte*"). Qwest's self-serving "analysis," however, is totally unreliable. In the first place, Qwest purports to exclude from its reported data on due date changes (PO-15) changes to an earlier date that were "approved" by the CLEC or its own retail customers. *Id.* However, the definition of PO-15 – which Qwest agreed to, and which Qwest presumably followed in reporting these data – already excludes customer-*requested* due date changes. *See* Attachment 2 hereto (definition of PO-15). Thus, it appears that the "customer-approved" due date changes that Qwest excludes from its "analysis" either already were excluded from its reported performance data, or constitute situations where Qwest initiated the change in the original due date but then obtained the customer's or CLEC's "approval." Second, Qwest's "analysis" excludes from the PO-15 data only "customer-approved" changes that resulted in completion of the orders *prior* to the original due date, while making no adjustments for such changes that result in completion of the order *after* the due date. Third, even if (as Qwest claims) the percentage of orders that "complete early" is higher for CLEC customers than for its own retail customers, Qwest's "analysis" rests on the premise that moving the original due date to an earlier date always has a positive impact on the CLECs and their customers. As Covad states, however, such a change "is hardly 'superior' service" when a dispatch is required, because it requires the CLEC to expend resources to notify the customer and can inconvenience the customer, who must rearrange his/her schedule to be available on the earlier completion date. Covad at 40 n. 58.

[99] AT&T at 41-43; Covad at 47-52; Eschelon at 6-9, 18; WorldCom at 9-11, 14-17.

[100] AT&T at 42; DOJ Eval. (Qwest II) at 11.

[101] *See ex parte* letter from Yaron Dari (Qwest) to Marlene Dortch, dated August 14, 2002, Attachment at 2 ("Qwest August 14 *ex parte*"). *See also* DOJ Eval. (Qwest II) at 11& n.48 (calculating Qwest's rejection rate for July 2002 as approximately 29 percent).

migration by telephone number and requires CLECs to include on a "migration-as-specified" orders certain information regarding the features that the customer is currently obtaining from Qwest, and not simply information regarding the features that the customer desires to take from the CLEC.[102] The likelihood of rejections is further increased by the above-described failure of Qwest to enable CLECs to integrate pre-ordering and ordering functions successfully and to ensure that the address information in the CRIS and PREMIS are the same.

Qwest's total flow-through rates are also too low, and its manual processing rates too high, to give CLECs a meaningful opportunity to compete.[103] As the Washington UTC notes, Qwest's reported data "show a high level of orders that do not flow through, and thus required manual handling."[104] In May, the percentage of orders manually processed by Qwest ranged from 29.4 percent to 53.4 percent in the joint application states.[105] The manual processing of orders increases the likelihood of delays and errors in provisioning – a risk that is not experienced by Qwest's retail operations, which use highly automated systems.[106]

Furthermore, KPMG's third-party testing established that Qwest commits numerous errors in manually processing orders. Just two months ago KPMG continued to find errors on

---

[102] *See* DOJ Eval. (Qwest II) at 11; WorldCom at 4-8. *See also* WorldCom at 4-8 (describing other aspects of Qwest's pre-order and order processes (not used by other RBOCs) that increase the likelihood of order rejections, including the display of multiple addresses when the CLEC uses the address validation function and the return of multiple CSRs in response to some CSR queries). Qwest has asserted that "high reject rates cannot be attributed *solely* to Qwest," because rejection rates vary among CLECs. *See* Qwest August 14 *ex parte*, Attachment at 6 (emphasis added). Qwest, however, misses the point. The burden is on Qwest to demonstrate the percentage of order rejections that result from "CLEC errors," as opposed to the percentage that should be attributed to Qwest itself. *See, e.g., Second Louisiana 271 Order* ¶¶ 111-112; *South Carolina 271 Order* ¶ 108. Qwest has not done so.

[103] AT&T at 42-43; Eschelon at 6; WorldCom at 14-16.

[104] WUTC 39th Supplemental Order ¶ 83. The Washington UTC nonetheless declined to find Qwest in violation of Section 271 because the evidence did not show whether the low flow-through rates were due to CLEC error. *Id.* The UTC, however, missed the point. As the applicant, Qwest bears the burden of proving that the low flow-through rates cannot fairly be blamed on itself. Furthermore, the UTC failed to recognize that manual fall-out due to "CLEC errors" has been excluded from the calculation of flow-through data since March 2002. AT&T at 42 n.108.

[105] DOJ Eval. (Qwest I) at 17; AT&T at 42 & Finnegan/Connolly/Menezes Decl. ¶ 175. The overall flow-through rates of manual processing in June 2002 represented little improvement over those in May 2002. In June, the percentage of LSRs that were manually processed in the four States at issue was 20.9 percent in Montana, 50.3 percent in Utah, 43.1 percent in Washington, and 44.8 percent in Wyoming.

approximately 15 percent of the orders that it reviewed.[107] Citing KPMG's findings, both the Montana PSC and the Washington UTC describe these errors as serious and continuing problems, despite their general recommendations that Qwest's application be approved. In describing its two "significant concerns" about the application, the Montana PSC states:

> The first regards *Qwest personnel making mistakes on CLEC orders that are manually processed.* Qwest asserts that improved training and processes will remedy the situation but, like KPMG, *the Commission lacks evidence to determine whether Qwest's efforts have adequately addressed this problem.* It will be important on a going-forward basis for the Montana PSC to ensure that adequate performance measures are in place to monitor Qwest's manual order handling. Qwest's proposal to use a collaborative process to develop a PID that will measure its accuracy in handling manual service orders will help to assess Qwest's success in addressing this issue.[108]

The Washington UTC also has expressed concern "about the number of orders that are manually handled, and the number of human errors that appear to occur due to manual handling.'[109] In fact, the UTC found that, in view of the manual errors found by KPMG and

---

[106] AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 162-163.

[107] AT&T at 42-43; Covad at 48; WorldCom at 16; DOJ Eval. (Qwest I) at 21. In view of the agreement of the commenters regarding KPMG's finding, Qwest's attempt to dispute that KPMG found an error rate of 15 percent is illogical. *See* Qwest August 8 *ex parte* at 4 . As discussed below, even Qwest's own commercial data (both the PO-20 data in its performance reports and the "internal" data that Qwest has submitted in this proceeding) support a conclusion that its error rate approaches 15 percent. DOJ Eval. (Qwest II) at 13 & n.63. Moreover, although Qwest has attempted to minimize the significance of the 15 percent figure computed by KPMG by asserting that KPMG reviewed a very small number of orders, such an argument is disingenuous. As the DOJ has stated, KPMG recommended additional retesting to focus on the accuracy of manually processed orders, but "Qwest elected not to support a retest, so the Observation [3110] was designated 'closed/unresolved.'" DOJ Eval. (Qwest I) at 21; *see also* Finnegan/Connolly/Menezes Decl. ¶ 191. Qwest's insistence on ending the KPMG test on May 28, 2002, without further retesting of such competitively critical areas of the OSS as manual errors, change management, and the test environment occurred at about the same time the issue of the effect of Qwest's secret agreements on the validity of the results of the KPMG agreements on the validity of the results of the KPMG test (including areas where KPMG found that Qwest had satisfied test criteria). Qwest also cannot reasonably rely on the results of the Liberty Data Reconciliation as evidence that its manual error rate is lower than that found by KPMG, since Liberty itself found numerous such errors but later failed to verify whether Qwest had corrected the problems. *See id.* ¶ 192 & n.141; Qwest August 8 *ex parte* at 4.

[108] Montana PSC at 21 (emphasis added). The second "significant concern" expressed by the Montana PSC – the accuracy and reliability of Qwest's performance results – was also described by the PSC as the result (at least in part) of "human error during manual order processing." *Id.* at 22 (citing KPMG's findings).

[109] WUTC 39th Supp. Order ¶ 141.

Liberty in their third-party testing of Qwest's performance data, some of the data should be given lesser weight:

> However, *KPMG's and Liberty's efforts in combination provide a picture of Qwest personnel not handling orders and troubles as required by the PIDs.* While Qwest has made efforts to provide additional training and auditing of personnel, and has agreed to address the issues through the PIDs, *these problems appear to affect the accuracy of the data for PID OP-4 at the very least, and possibly OP-3 and OP-6.* [Thus,] we suggest *that the FCC give lesser weight to performance data for measure OP-4.*[110]

KPMG's findings should be dispositive here, because Qwest had not reported data on service order accuracy (manual order accuracy) in its regular performance reports at the time of its application. Only recently did Qwest begin to report such data (and only after a recommendation by KPMG that it do so). As the DOJ has found, the lack of regularly reported commercial data on the accuracy of Qwest's manual order processing "renders the record incomplete" and raises "a serious issue, particularly given the expert tester's carefully expressed concerns."[111]

The manual order accuracy data (PO-20) that Qwest recently reported for the first time (for June 2002) undoubtedly overstates the accuracy of its manual processing and understates the degree of its manual errors, because its scope is so limited.[112] Even under Qwest's unduly

---

[110] *Id.* ¶ 35 (emphasis added). *See also id.* ¶ 170 ("the performance data for the OP-4 and possibly the OP-6 measures should not be accorded much weight given the problems identified by KPMG and Liberty") ; *id.* ¶ 365 "The problems with human errors found by Liberty and KPMG may affect the accuracy of data for measure OP-4 and possibly measures OP-3 and OP-6. Data for these measures should be given lesser weight for purposes of evaluating Qwest's compliance with the competitive checklist in section 271"). PID OP-4 measures installation intervals, while OP-3 measures the percentage of installation commitments met by Qwest, and OP-6 is the average number of business days by which installation of the requested service is delayed beyond the original due date.

[111] DOJ Eval. (Qwest II) at 12; DOJ Eval. (Qwest I) at 21. *See also* AT&T Finnegan/Connolly/Menezes Decl. ¶ 180 (quoting portion of KPMG's Final Report expressing concern about the "numerous problems" that KPMG encountered during the test regarding the accuracy of manually processed orders).

[112] *See* Finnegan/Connolly/Menezes Decl. ¶ 195 (describing Qwest's failure to include in PO-20 any evaluation of whether Qwest representatives correctly re-enter universal service ordering codes or field identifiers, even though USOCs and FIDs are used on virtually every LSR submitted by a CLEC). Given the inadequate scope of PO-20 as reported by Qwest, its recent request to the state commissions that this metric be included in its Performance Assurance Plan should be given no weight. *See ex parte* letter from Yaron Dori (Qwest) to Marlene H. Dortch,

narrow definition of manual order accuracy, however, its manual order accuracy rate under PO-20 in June was only 90.25 percent for UNE-P and resale POTS orders and 96.46 percent for orders for unbundled loops.[113] Thus, under Qwest's own definition of manual order accuracy, it committed errors on nearly 10 percent of manually processed orders for UNE-P and resale POTS, and 5 percent of manually handled orders for unbundled loops. The PO-20 rates for July that Qwest recently provided to the Commission were essentially the same for UNE-P and resale POTS orders, and *lower* for UNE loop orders, than those in June.[114] Moreover, notwithstanding Qwest's claims that it has taken "quality assurance measures" to reduce the number of human errors in manual order processing, the PO-20 rates for June and July represent little improvement (less than one percentage point) as compared to Qwest's calculations in a recent *ex parte* of what the PO-20 rates "would have been" for April 2002.[115]

---

dated August 9, 2002. Qwest's narrow definition of PO-20 makes the 95 percent benchmark that it proposes for this metric far easier to attain, thus giving it little incentive to improve the accuracy of its manual processing. Indeed, as noted below, Qwest's reported data for PO-20 show that its accuracy rate (as defined by Qwest) in June already exceeded the proposed 95 percent benchmark for UNE loop orders, and was close to that rate for UNE-P and resale POTS orders.

[113] Qwest August 8 *ex parte* at 5; Finnegan/Connolly/Menezes Decl. ¶ 195 n.145.

[114] Qwest August 8 *ex parte* at 1-3 (describing "quality assurance measures" taken by Qwest); *id.* at 5 (stating that rates for July 2002 were 90.58 percent for UNE-P and resale POTS orders, and 95.20 percent for UNE loop orders). Although Qwest claims that "system enhancements" scheduled for implementation on August 17, 2002, will address "two of the most common errors" made by its service representatives in manually processing orders, the implementation of those enhancements is so recent that their effectiveness cannot be evaluated. Thus, Qwest's "analysis" of PO-20 data for months prior to August to determine "what impact this system enhancement would have had" on such data is an exercise in sheer speculation. *See id.* at 5. Even leaving aside the speculative nature of Qwest's "analysis," there is no reason to believe that the "enhancements" will improve the accuracy of its manual processing. Although Qwest claims to have implemented a number of "enhanced edits in the SOP to prevent SDCs from making common errors" when they convert an LSR that has fallen out for manual processing into a service order, Qwest recently acknowledged that all but one of those edits were implemented by October 2001. *See* Notarianni/Doherty Reply Decl. in WC Docket No. 02-148, ¶ 89; *ex parte* letter from Hance Haney (Qwest) to Marlene H. Dortch, dated August 13, 2002, at 5. Given the unacceptably high error rate found by KPMG as recently as last May, it is clear that these "enhanced edits" have done little, if anything, to reduce the error rate. Moreover, despite the claim in its application that its SDCs receive "targeted training" for the purpose of ensuring accurate manual processing, a recent *ex parte* filed by Qwest shows that the "training" on which it relies includes many areas that have no relationship to manual order accuracy. *See ex parte* letter from Hance Haney (Qwest) to Marlene H. Dortch, dated August 14, 2002, Attachment 1-18 (listing training in such areas as billing, Qwest's performance assurance plans, 272 review requirements, the change management process, and the code of conduct).

[115] *Id.* (stating that rates for April 2002 "would have been" 89.73 percent for UNE-P and resale POTS orders, and 94.51 percent for UNE loop orders).

Given the deficiencies in its definition of PO-20, and the unacceptable rate of errors described even in the data reported by Qwest under that definition, Qwest cannot show that its rate of manual order accuracy is consistent with the requirements of Section 271. As AT&T has previously demonstrated, the various alternative data that Qwest has presented in an attempt to show that its error rate in manually processing CLEC orders is low are plainly self-serving and unreliable.[116] More significantly, as the DOJ concludes, even as flawed as they are, Qwest's alternative data, together with Qwest's reported PO-20 data, indicate that through mid-August Qwest's "total percent of human error did approach 15 percent."[117]

Second, like the KPMG test and Qwest's own reported performance data, the comments confirm that Qwest does not provide the accurate, complete, and timely order status notices that CLECs need in order to have a meaningful opportunity to compete. The comments show, for example, that Qwest does not return jeopardy notices in a timely fashion, transmits jeopardy notices after Qwest initially issued a FOC but later discovered that the order was in error, and issues completion notices before provisioning has actually been completed.[118] These

---

[116] *See,* Finnegan/Connolly/Menezes Decl. ¶ 196-199 (describing the unreliability of Qwest's data regarding "application date accuracy, "rejects in error," troubles reported within 30 days, and "service order mismatches" as measures of the accuracy of Qwest's manual processing of CLEC orders); DOJ Eval. (Qwest II) at 12-13 (finding that such data are "an imperfect representation of Qwest's performance"). Qwest's recent, belated attempt to justify its use of "FOCs after rejects" as the measure of erroneous manual rejections should be given no weight. *See ex parte* letter from Hance Haney (Qwest) to Marlene H. Dortch, dated August 15, 2002. In its prior submissions to the Commission, Qwest unequivocally described its measure as the percentage of manually rejected orders for which it sent a FOC after it initially sent a rejection notice – a process that, as Qwest admits, is followed even when an LSR is rejected *appropriately* by Qwest. *Id.* at 1; Finnegan/Connolly/Menezes Decl. ¶ 198; Notarianni/Doherty Decl. ¶ 333 & n.479 & Exh. LN-OSS-27; *ex parte* letter from Hance Haney to Marlene H. Dortch in WC Docket No. 02-148, dated July 12, 2002 (table). In any event, Qwest's claim that it erroneous rejects less than one percent of manually processed orders is unreliable, given the vastly higher rates of erroneous rejections that occurred during Qwest's third-party testing with AT&T. *See* Finnegan/Connolly/Menezes Decl. ¶ 213.

[117] DOJ Eval. (Qwest II) at 12-13 & n.63.

[118] *See* AT&T at 44; Covad at 16-23; WorldCom at 17-19. The Washington UTC acknowledges that Qwest's reported data describe "erratic" performance by Qwest in the provision of jeopardy notices, but finds that because "there is very little data on which to base a conclusion," the UTC was "not persuaded that Qwest does not comply" with the requirements of the checklist regarding jeopardy notices. WUTC 39th Supp. Order ¶ 151. The Washington UTC, however, erred in assuming that the burden of proof was on the CLECs to establish that Qwest was not in compliance with the checklist – when, under the Commission's rulings, precisely the opposite is true. *See, e.g.,*

deficiencies put CLECs at a severe competitive disadvantage with Qwest's retail operations, which have real-time, fully automated access to order status information.

Billing. The comments demonstrate that Qwest has not met its obligation to provide "complete, accurate, and timely" daily usage files ("DUFs") and wholesale bills to CLECs.[119] In addition to the numerous billing errors that AT&T described in its opening comments, Eschelon states that it has more than $2.2 million in outstanding disputes with Quest as a result of inaccurate charges on its bills, that *all* of its bills for UNE-Eschelon/UNE-Star (which represents approximately 60 percent of Eschelon's total bill amounts) have been inaccurate, and that its DUFs do not include minutes of use for intraLATA toll traffic carried by Qwest.[120] WorldCom likewise states that it has "opened billing disputes with Qwest for hundreds of thousands of dollars."[121] The Montana PSC states that Qwest's performance results relating to wholesale billing accuracy "indicate a persistent problem exists in the billing area."[122] The inaccuracy of Qwest's wholesale bills and DUFs is further confirmed by KPMG's third-party testing, where Qwest repeatedly transmitted erroneous wholesale bills and failed KPMG's test for DUF accuracy and completeness five separate times before it finally (and barely) passed on the sixth try.[123]

The errors in Qwest's wholesale bills described in the comments undoubtedly understate the full extent of Qwest's failure to provide accurate bills, because they are based on a limited

---

Georgia/Louisiana 271 Order, App. D ¶ 5 ("The BOC at all times bears the burden of proof of compliance with Section 271, even if no party challenges its compliance with a particular requirement").

[119] *See, e.g., New Jersey 271 Order* ¶ 121; AT&T at 45-47; Eschelon at 35-39; McLeod at 3-4; WorldCom at 20-22. *See also* Touch America at 5.

[120] Eschelon at 35-36, 40-41.

[121] WorldCom at 21.

[122] Montana PSC at 22.

[123] *See* AT&T at 45-47; WorldCom at 21; WUTC 39th Supp. Order ¶ 120 (finding that Qwest appears to have corrected the DUF problems found by KPMG, "even if it took six retests to correct the problem')..

review of the cumbersome, voluminous *paper* bills which Qwest provides to CLECs.[124] Qwest does not provide CLECs with the fully auditable bill which this Commission has required as a condition of Section 271 approval, and which the DOJ describes as an "important factor in making local telecommunications markets fully open to competition."[125]

The DOJ thus continues to express concerns regarding the auditability of Qwest's electronic bills that it described in *Qwest I*,. In its *Qwest I* evaluation, the DOJ concluded that "Qwest's application as filed does not demonstrate that it provides CLECs with electronically auditable wholesale bills for the UNE platform," and that "[I]t is unclear whether Qwest's billing system, absent reliance on BOS-BDT, satisfies the requirement of electronic auditability."[126] In its newest evaluation, even after reviewing Qwest's second application and the additional submissions of "evidence" by Qwest, the DOJ finds that Qwest *still* has not demonstrated the electronic auditability of its CRIS bills, or "the feasibility of using commercial technology to audit Qwest's wholesale bills electronically," particularly 'for CLECs with large billing volumes."[127] The DOJ notes that despite Qwest's repeated claims that the information in ASCII or EDI formats on its electronic bills can be transferred into commercially available software, Qwest did not even purport to describe the processes for such transfers.[128]

Qwest's wholesale electronic bills have not been auditable because they have not provided using the industry standard CABS BOS BDT format, which would permit CLECs to use computer software to audit the data. Until July 1, 2002, Qwest generated electronic bills

[124] *See, e.g.,* WorldCom at 21.

[125] *New Jersey 271 Order* ¶ 124; *Pennsylvania 271 Order* ¶ 22; DOJ Eval. (Qwest I) at 23 & n.101; DOJ Eval. (Qwest II) at 17; AT&T at 46-47; WorldCom at 20-22.

[126] DOJ Eval. (Qwest I) at 23-25.

[127] DOJ Eval. (Qwest II) at 15-16.

[128] *Id.* at 16.

using its non-industry-standard "CRIS" system and its own proprietary format, which precluded the bills from being audited with the use of currently available software.[129]

Qwest's bills, unlike those of other BOCs, fail entirely to provide critically important data that is necessary both to audit the bills and confirm their consistency with actual CLEC orders and to facilitate such basic competitive requirements as determining tax liability. For example, unlike other BOCs' bills, Qwest's CRIS-based bills do not provide a breakdown of usage by jurisdiction (i.e., originating minutes of use Local, intraLATA; terminating minutes of use Local, intraLATA, and interLATA) necessary to determine tax liability to the various jurisdictions. In addition, Qwest's bills, again unlike other BOCs' bills, lump non-recurring and other charges into broad and undefined categories such as "Charge for Unbundled Services (X15)" or "Adjustment for Unbundled Services (X18)" that do not allow reconciliation of specific types of charges (e.g., UNE-P service order charges) with orders.

Although Qwest has generated electronic bills for wholesale charges in BOS BDT format since July 1, 2002, the bills are still generated by Qwest's CRIS system – not by CABS. Qwest's use of CRIS precludes CLECs from designing a single system to handle and audit the CRIS bills, since Qwest's three billing centers provide CRIS bills with differing levels of detail.[130] Moreover, Qwest has advised CLECs that the new CRIS bills will not be subject to CABS BOS edits, which increases the likelihood that the electronic bill will be inaccurate.[131]

Even in the short time since its implementation, the CRIS BOS BDT bill has already proven to be flawed. When AT&T received its first three such bills during the week of July 15, AT&T was unable to load or process them, because Qwest used suffix codes that were

[129] *See* AT&T at 46; WorldCom at 20-21.
[130] AT&T Finnegan/Connolly/Menezes Decl. ¶¶ 252, 259; WorldCom at 20-21.
[131] *See* Finnegan/Connolly/Menezes Decl. ¶ 259.

inconsistent with industry standards for BOS electronic bills.[132] Even after Qwest admitted that it had erred and resubmitted the three bills with the current codes, the BOS BDT bills sent to AT&T continued to be seriously defective.[133] Because of these problems (and the fact that AT&T was the only CLEC receiving the CRIS electronic bills in BOS BDT format), the DOJ concluded that it "once more cannot draw positive conclusions about he adequacy of Qwest's BOS BDT format."[134] Even if these problems are resolved, however, experience to date with the new CRIS BOS bill illustrates that it will take some time before all deficiencies in the bill have been determined and fixed.[135]

C. The Performance Data Upon Which Qwest Relies Are Unreliable and Fail to Prove Section 271 Compliance.

The comments confirm that Qwest's performance data are inaccurate and unreliable and cannot reasonably be considered a reflection of Qwest's actual performance, and that even Qwest's inadequate data show that Qwest is not satisfying its statutory obligations. The State commissions simply ignore this evidence or rely on speculation that the performance enforcement plans will somehow compel Qwest to improve its performance. That is plainly impermissible.[136] Moreover, the inherent unreliability of Qwest's performance data, coupled with the structural defects in the performance remedy plans, preclude them from serving their intended purpose.

---

[132] AT&T at 47 n.139 & Finnegan/Connolly/Menezes Decl. ¶ 260.

[133] AT&T Finnegan/Connolly/Menezes Decl. ¶ 261.

[134] DOJ Eval. (Qwest II) at 15 & n.77.

[135] *Id.;* WorldCom at 20. *See also Pennsylvania 271 Order* ¶ 19 (noting that nine months after Verizon first introduced its BOS BDT bill, and even after Verizon suspended such billing for four months to allow for system corrections, Verizon and the CLECs still identified "a number of problems that required correction"). As the DOJ notes, no independent third party tested Qwest's CRIS BOS BDT bill prior to its implementation, much less tested the auditability of any of Qwest's electronic wholesale bills.. DOJ Eval. (Qwest II) at 14 n.67; DOJ Eval. (Qwest I) at 23 & n. 106, 25 n. 115. Although AT&T conducted testing of the bill with Qwest during the month prior to implementation, Qwest limited the testing to a single bill file consisting of 14 usage records and 38 recurring charge records. The bill contained no records for other charges and credits, adjustments, or taxes. Because it desired more thorough testing, AT&T requested that Qwest provide a BOS BDT version of a previously issued paper bill prior to the scheduled July 1 implementation date. Qwest, however, refused to do so. AT&T Finnegan/Connolly/Menezes Decl. ¶ 261 n.192.

[136] *New York 271 Order* ¶ 37.

1. The Audits and Data Reconciliations Do Not Prove Qwest's Data Are Accurate.

Qwest cannot reasonably rely on the Liberty Performance Measurement Audit, the Liberty data reconciliation process, the KPMG data reconciliation process, or the Cap Gemini Ernst & Young ("CGE&Y") Performance Measurement Audit as proof that its performance data are accurate. The Liberty and CGE&Y performance measurement audits were not designed to and did not test the accuracy of Qwest's raw data inputs.[137] As a consequence, those audits cannot rationally be characterized as proof of the accuracy of Qwest's performance data.

Moreover, the study objective of the Liberty data reconciliation was fundamentally flawed, and the study itself was extremely limited as to temporal, geographical, product and measurement scope.[138] Remarkably, even the flawed Liberty data reconciliation process revealed substantial problems regarding the integrity of Qwest's data, and Liberty closed observations without verifying that Qwest's proposed fixes actually eliminated the errors that Liberty uncovered in Qwest's data.[139] Liberty reviewed Qwest's training materials, but "never confirmed whether the training took place or if it was efficacious."[140] Similarly, in a number of instances, Liberty closed observations before verifying that code fixes or other corrective measures successfully eliminated other errors in Qwest's performance reporting processes.[141]

Qwest cannot bridge the data accuracy gap with the KPMG OSS test. Indeed, KPMG was unable to determine whether Qwest's performance data for the pseudo-CLEC

---

[137] Finnegan Decl. ¶¶ 19-25, 100-109.
[138] *Id.* ¶¶ 26-36.
[139] Finnegan Decl. ¶¶ 39-78; Covad at 53-55.
[140] Covad at 55. *See also* Finnegan Decl. ¶¶ 45-49, 57-58. 62, 68, 72.
[141] Covad at 54-55. *See also* Finnegan Decl. ¶¶ 43-44, 50-52, 59, 64-68.

matched KPMG's data, and KPMG found that Qwest's errors during the manual processing of orders could result in inaccuracies in reported results.[142]

Undaunted by the evidence, the Wyoming and Utah PSCs accept at face value Liberty's ultimate finding that Qwest's data are accurate.[143] Both the Montana PSC and Washington UTC concede that the Liberty and KPMG audits and data reconciliation processes revealed substantial problems regarding the reliability of Qwest's data, but nonetheless rationalize their support for Qwest's Application. The Montana PSC, citing, *inter alia*, KPMG's findings regarding the high rates of error during manual processing, acknowledges that the accuracy of Qwest's performance data remains a "significant concern."[144] The Washington UTC, noting that both KPMG and Liberty found that Qwest did not "handl[e] orders and troubles as required by the PIDs," admits that performance results for PID 0P-4 (installation intervals), OP-3 (installation commitments met) and OP-6 (average number of delay days) may be inaccurate and should be accorded "lesser weight."[145] Despite these concessions, the Washington and Montana state regulatory commissions nonetheless conclude that the audit provisions in the QPAPs will serve as an effective tool in assessing the reliability of Qwest's data in the future.[146] But the Commission has emphasized that when an incumbent local exchange carrier files a Section 271 Application, it is expected that the carrier "is already in full compliance with the requirements of Section 271 and submits with its Application sufficient factual evidence to support such compliance."[147] The audit provisions in the QPAPs, designed to

---

[142] Montana at 22; Finnegan Decl. ¶¶ 85-87, 89-99.

[143] Wyoming Comments, Attach. I, ¶¶ 19-20; Utah PSC Final Order Regarding Qwest 271 Compliance, issued July 8, 2002, Docket No. 00-049-08-at 4-5.

[144] Montana at 21.

[145] *See* WUTU 39th Supplemental Order at 25.

[146] *Id.*, ¶ 36; Montana at 22.

[147] *Michigan 271 Order* ¶ 55

ensure future compliance, cannot substitute for the required showing by Qwest that it is presently satisfying its Section 271 obligations. Against this backdrop, there is no sound basis upon which Qwest can reasonably contend that the KPMG OSS test or the other audits and data reconciliation processes upon which it relies somehow validated the accuracy of its performance data.

2. Qwest's Performance Metrics Are Flawed and Do Not Show Statutory Compliance.

Qwest's performance results are also unreliable because they omit important metrics and fail to capture actual performance. The current PIDs do not include a measure on service order accuracy. Although Qwest's Application includes results on its proposed PO-20 service order accuracy measure, the measure upon which it relies has been rejected by the CLECs because it is far too limited in scope.[148] The lack of commercial performance data on the accuracy of Qwest's manually-processed orders is a serious matter, particularly in view of KPMG's stated concerns regarding errors in Qwest's data.[149] Remarkably, even based upon Qwest's flawed measure, Qwest admittedly committed errors on approximately 10% of resale and UNE-P orders.[150]

Furthermore, Qwest's "New Build Policy" – which rejects CLEC orders in 30 days or less for lack of facilities while Qwest's retail customers are permitted to wait for facilities to become available – discriminates against CLECs and has the "perverse effect of masking in Qwest's performance reports its delays in filling competitors' orders, because competitors' rejected and 'held' orders are excluded from" performance results.[151] Qwest's

[148] Finnegan/Connolly/Menezes Decl. ¶ 195.
[149] Finnegan Decl. ¶¶ 85-99; Covad at 47-48.
[150] Finnegan/Connolly/Menezes Decl. ¶195 n. 145.
[151] Covad at 4.

exclusion of such orders from its performance results necessarily means that its reported rejection notice intervals are understated, and that is ordering and provisioning results are inaccurate.[152]

Even Qwest's inadequate and unreliable commercial data show that it has failed to meet benchmark and parity standards. The comments confirm that: Qwest's rejection rates are unacceptably high by any commercial standard; its Qwest's flow through rates are too low; and its excessive reliance on manual processing increases the risk of provisioning error and delay.[153] Qwest also does not provide timely, accurate and complete order status notices.[154]

Similarly, Qwest fails to provide nondiscriminatory access to provisioning and maintenance and repair functions. The comments show that "[o]nce CLECs surmount the hurdles presented by Qwest's ordering process, Qwest takes far too long to provision basic (UNE-P) orders" and fails to provision CLEC orders at parity.[155] Furthermore, Qwest's own reported data show that repeat trouble rates for CLECs are consistently higher than those for Qwest's retail customers,[156] and that Qwest has failed to meet the "maintenance and repair standards for line sharing and DS-1 compatible loops."[157] Additionally, Qwest has failed to

---

[152] Covad at 4, 44-45; Finnegan Decl., ¶¶ 119-129. The comments also show that Qwest's PO-4 results — which the Washington UTC concedes should be given lesser weight because of possible inaccuracies in the data — are otherwise misleading. Indeed, the comments show that, because of Qwest's subpar performance, CLECs may be forced to request longer than standard intervals, and that Qwest's performance results under PO-4 do not reflect Qwest's actual performance since "orders for which the customer requests due dates greater than the standard interval are excluded from OP-4." Eschelon at 40.

[153] AT&T at 41-43; WorldCom at 8-9, 14-16; Eschelon at 6-9; Covad at 47-52. *See also* WUTC 39th Supplemental Order ¶ 83 (conceding that Qwest's performance data "show a high level of orders that do not flow through, and thus required manual handling," but nevertheless declining to find a failure to comply with Section 271).

[154] AT&T at 144; Covad at 16-23; WorldCom at 17-19. *See also* WUTC 39th Supplemental Order ¶ 151 (admitting that Qwest's provisioning of jeopardy notices has been "erratic").

[155] WorldCom at xi, 13; Finnegan Decl. ¶¶ 175-176.

[156] WorldCom at 19; Covad at 42; Finnegan Decl. ¶¶ 177-178, 183. *See also* Washington at 10 (conceding that Qwest has not met performance standards on the repeat troubles measures).

[157] Washington at 10; Finnegan Decl. ¶ 181. *See also* Covad at 42 (noting that "Qwest's line sharing maintenance and repair performance casts into doubt Qwest's commitment to competition in Washington").

perform at parity when meeting the repair appointments for CLEC customers.[158] For all of these reasons, Qwest has failed to meet its burden of proving that its data are accurate and show any statutory compliance.

III. THE COMMENTS CONFIRM THAT QWEST'S RECURRING AND NON-RECURRING RATES DO NOT SATISFY CHECKLIST ITEM TWO.

In the more than six years since the Act was passed, the state commission in Montana, Utah, Washington and Wyoming have *never* established TELRIC-compliant rates. The Washington commission adopted switching rates for Qwest based on *Verizon-specific* switching data from *1994*. And the loop rates adopted by the commission are based on a black-box amalgam of three cost models, all of which the Washington commission conceded violated TELRIC principles. In Utah, the state commission, after rejecting Qwest's recurring cost models as non-TELRIC, ultimately adopted recurring rates that are based on those cost models. Even the more recent in Wyoming and Montana rates are riddled with clear TELRIC errors. The Wyoming commission initially tried to set cost-based rates. But under Wyoming state law, the incumbent carrier is permitted to reject rates adopted by a state commission. Qwest exercised this right, and ultimately obtained much higher UNE rates from the beaten down Wyoming commission. And the stipulated rates in Montana contain the express disclaimer that no party's position in that docket is accepted by the other parties by virtue of their entry into this Stipulation, nor does it indicate their acceptance, agreement or concession to any rate-making principle, cost of service determination, or pricing principle embodied, or arguably embodied, in that Stipulation. On this record, Qwest's application must be rejected, and Qwest should refile its application only after Qwest and the state commissions demonstrate a commitment to setting and maintaining TELRIC-compliant rates.

---

[158] Finnegan Decl. ¶¶ 162-165.

Qwest is well aware that its rates in Montana, Utah, Washington and Wyoming are not TELRIC-compliant. In an effort to overcome that fatal flaw in the record, Qwest implemented last minute reductions to certain rate elements so that, according to Qwest's analyses, those rates would satisfy the Commission's benchmarking test using Colorado as the benchmark state. However, the comments confirm that Qwest's benchmarking analysis is fundamentally flawed because it relies on standardized usage assumptions rather than state-specific usage assumptions, and also fails to account for the fact that the Commission's Synthesis cost model is a poor indicator of non-loop cost differences between very rural states (*e.g.,* Wyoming and Montana) and less rural states (*e.g.,* Colorado).[159] When the benchmarking comparisons are done properly, Qwest's Washington and Utah non-loop rates are as much as 14% higher than Colorado rates, on a fully cost-adjusted basis, and Qwest's switching rates in the more rural states (Montana and Wyoming) are as much 52% higher than those in Colorado, on a cost-adjusted basis.[160]

In any event, as demonstrated by AT&T, and as noted by DOJ, Qwest's rates could not be found to be TELRIC-compliant in any of the four states, because Qwest's Colorado UNE rates are themselves inflated by clear TELRIC errors.[161] Qwest's NRC cost model contains TELRIC errors that substantially inflate NRCs that are critical for CLEC entry – *e.g.,* hot cut NRCs and basic loop install NRCs – by more than 100%. Likewise, Qwest's Colorado recurring UNE loop and switching rates are inflated by clear TELRIC errors. Although the Colorado PUC correctly relied primarily on the HAI Model to compute loop and switching rates, it adopted numerous non-TELRIC-compliant inputs that vastly inflated those rates.

[159] *See* AT&T at 53-60; WorldCom at 32-35.

[160] These figures are based on Qwest's currently filed rates in all four states in the application, and on Qwest's original filed rates for Colorado. If the recent Colorado rate reductions were taken into account, the cost-adjusted rate differences between Montana, Utah, Washington and Wyoming compared to Colorado would be even larger.

[161] *See* DOJ Eval. (Qwest I) at n. 156; AT&T at 85-95.

There also are other problems with using Colorado as the anchor state. Most notably, Qwest has not yet received section 271 approval for Colorado. The Commission's benchmarking analysis is a short-cut to assessing TELRIC-compliance. A necessary prerequisite of that short-cut is that the Commission has already found the rates in the benchmark state to be TELRIC-compliant. The Commission has made no such finding here. Moreover, relying on a state (Colorado) that is itself undergoing the Section 271 process raises serious due process issues. Qwest already has admitted that the Colorado rates against which it initially benchmarked its rates were inflated by at least one clear TELRIC error, and has changed the corresponding rates for Colorado. But Qwest has not yet filed new rates in the four states in its application to account for the Colorado rate reduction, which means that even under Qwest's (flawed) benchmarking analysis, the rates currently in place for those states do not pass the Commission's benchmarking analysis using Colorado as the benchmark state.

Presumably, Qwest will eventually attempt to file new rates in this proceeding for Montana, Utah, Washington and Wyoming, that are re-calibrated to Qwest's new Colorado rates. At that time, commenters will be forced to respond to Qwest's rates *du jour* after the period for filing initial and reply comments has expired, and with no assurance that Qwest will not again move the target by again changing its Colorado rates. To avoid these serious concerns, the Commission at least should enforce its complete when filed rule, and restart the 90-day review period for Qwest's application after Qwest files its new rates.

Finally, the Comments confirm that even aside from the problems discussed above, there is separate and independent evidence that the UNE rates in Montana and Washington violate Checklist Item Two. Accounting for all possible potential revenues that may be available to new entrants (including interLATA toll contributions, intraLATA toll contributions, and state and federal universal service revenues) and accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry.[162] Thus, Qwest's UNE rates in Montana and Washington are discriminatory in violation of Checklist Item 2.[163]

Local entry in Wyoming and Montana also is foreclosed by Qwest's anticompetitive deaveraging methodology. Qwest and the state commissions in Wyoming and Montana implemented a deaveraging methodology that makes it virtually impossible for potential entrants to determine which customers are located in which UNE rate zones.[164] Consequently, potential new entrants must request that information from Qwest on a customer-by-customer basis,[165] which inhibits local entry in two ways: (1) because the revenues available to new entrants varies widely from UNE zone to UNE zone, the inability to determine which potential customers are located in which UNE zone (except on a case-by-case basis) makes it difficult, if not impossible, to develop and implement and effective entry strategy and (2) because Qwest knows exactly where CLECs intend to enter – indeed, CLECs must request customer UNE zone information directly from Qwest – Qwest has the anticompetitive incentive and ability to misuse this highly sensitive business plan information to target CLEC customers.

A. Qwest's Montana, Utah, Washington and Wyoming UNE Rates Cannot Be Justified On A Benchmarking Theory.

Qwest's benchmarking analysis currently is in a state of limbo. After Qwest filed its initial application in this proceeding, Qwest conceded that its Colorado non-loop rates were inflated because they double-counted Qwest's vertical features costs. That means that the non-

---

[162] *See* AT&T, Lieberman/Pitkin Decl. ¶ 50-55; WorldCom at 35-36; OneEighty at 5-6.

[163] The fact that Qwest's UNE rates in these states preclude competitive local entry also shows that a grant of Qwest's applications would contravene the public interest. *See* AT&T at 150-153; WorldCom at 36.

[164] *See* AT&T at 53.

[165] *See id.*

loop rates Qwest filed in this proceeding for Montana, Utah, Washington and Wyoming are all now above Qwest's current Colorado UNE rates, on a cost adjusted basis. Presumably, Qwest intends to file new rates for each state in its application that are "re-calibrated" so that those rates – at least according to Qwest's flawed analyses – pass the Commission's benchmark test, using Colorado as the anchor state. When Qwest does file such new rates and new analyses, AT&T and other parties will be required, once again, to analyze Qwest's new rates and new benchmarking analyses.

Loop Benchmarking. As demonstrated by AT&T, the Commission should reject Qwest's loop benchmarking analysis for Montana and Wyoming out of hand, because the benchmarking analysis masks the underlying TELRIC errors.[166] The purpose of the benchmarking analysis is to evaluate the potential impact of TELRIC violations, and to make a determination as to whether those violations inflate rates above the range that a reasonable application of TELRIC principles would have produced. Because the Commission's benchmarking analysis aggregates UNE rates for all UNE zones, the benchmarking analysis cannot be used to assess the impact of clear TELRIC errors in the deaveraging methodology.[167] The Commission's benchmarking analysis compares state-wide average UNE rates and, therefore, masks the clear TELRIC-errors in the deaveraging process.[168] Thus, it is not surprising that the DOJ "urges the Commission to carefully consider this issue."[169]

As explained by AT&T, the de-averaging processes in Montana and Wyoming are not remotely cost-based.[170] Unlike other states for which Section 271 application have been

[166] *See* AT&T at 53-54; *see also* DOJ Eval. (Qwest II) at 20.
[167] *See id.*
[168] *See id*.
[169] DOJ Eval. (Qwest II) at 20.
[170] *See id*.

approved,[171] the UNE rate zones in Montana and Wyoming are basically concentric circles formed around wire-centers, where the innermost circle is the lower-cost UNE rate zone, and the outmost circle is the higher-cost UNE rate zone. That means that a CLEC serving a customer near a wire center located in the middle of a city must pay the same UNE rate as a customer located near a wire center located on the top of an isolated mountain. Because loop costs vary by geography and demography, Qwest's Montana and Wyoming UNE de-averaged loop rates – which ignore those differences – cannot be cost-based.

Qwest's response to this showing – that "[o]ne of the most significant cost drivers for loops is distance from the central office"[172] – is plainly inadequate. To be sure, distance from the wire center is an important factor in determining costs, but distance is only one of several factors that determine loop costs.[173] That is why – as Qwest concedes – most states use a wire-center-based deaveraging scheme that accounts for the location of the wire-center, and not only distance from the wire center.

Qwest also defends its non-TELRIC UNE rate zones by noting that the Common Carrier Bureau granted the Wyoming commission's request seeking a waiver of the Commission's rules relating to how to target federal universal service support.[174] But that order only approved the Wyoming commission's request to distribute federal universal support based on Qwest's existing (non-cost-based) UNE rate zones.[175] The Bureau granted the waiver because allocating federal universal service support in a manner inconsistent with UNE rate zones could lead to anticompetitive results. The Bureau did not, however, in any way defend Qwest's non-cost-

[171] *See* DOJ Eval. (Qwest II) at 20.

[172] *See Ex Parte* Letter from David L. Sieradzki (Qwest) to Marlene H. Dortch, WC Docket No. 02-189, at 11 (filed August 15, 2002) ("Qwest Pricing *Ex Parte*").

[173] *See* Pitkin Reply Decl. ¶ 6.

[174] *See* Qwest Pricing *Ex Parte* at 11.

based Wyoming UNE rate zones. In fact, it is telling that the Wyoming Commission had to seek a waiver from the Bureau in the first instance. If Wyoming commission had implemented appropriate cost-based UNE rate zones, the Wyoming commission would not have been required to seek a waiver from the Commission.

Switching Benchmarking. The Comments confirm that Qwest's non-loop rates in all four states fail the Commission's benchmarking analysis, and that Qwest's benchmarking analyses must be rejected because Qwest's comparisons improperly rely upon national average "minutes of use" that do not reflect the relevant actual minutes of use for each state.[176] Because Qwest's non-loop benchmarking analysis starts with the "wrong" number of minutes, Qwest's analysis ends with the wrong benchmark results.[177] With a properly conducted benchmarking analysis – using state-specific minutes and Qwest's latest UNE rates – Qwest's non-loop rates in Washington and Utah, on a cost adjusted basis, exceed those of Colorado by 8% and 14%, respectively.[178] Qwest's analysis also fails to account for the fact that the Commission's Synthesis cost model is a poor indicator of non-loop cost differences between very rural states (*e.g.,* Wyoming and Montana) and less rural states (*e.g.* Colorado). With a properly conducted benchmarking analysis – using state-specific minutes and addressing the issues relating to the Synthesis Cost Model – Qwest's switching rates in Wyoming and Montana, on a cost adjusted basis, exceed those of Colorado by 32% and 52%, respectively.[179]

---

[175] *Wyoming Public Service Commission, Petition for Waiver of Targeting Requirements Found in Sections 54.309 and 54.311 of the Commission's Rules,* 16 FCC Rcd. 5350, ¶ 4 (2001).

[176] *See* AT&T at 55-58; WorldCom at 32-35.

[177] *See id.; see also* Worldcom at 32-35 (showing similar results).

[178] *See* Lieberman/Pitkin Decl. ¶ 22, Table I. As noted above, these figures are based on Qwest's currently filed rates in all four states in the application, and on Qwest's original filed rates for Colorado. If the recent Colorado rate reductions were taken into account, the cost-adjusted rate differences between Montana, Utah, Washington and Wyoming compared to Colorado would be even larger.

[179] *See id.* ¶ 24, Table II. Qwest asserts that AT&T's initial benchmarking analysis (1) incorrectly assumes that Qwest imposes the local switching usage rate twice when a call originates and terminates within the same local

Minutes of Use. As demonstrated by WorldCom and AT&T, a benchmarking analysis using state-specific minutes of use conclusively shows that the switching rates in all four states (and total non-loop rates in two of the four states) fail the Commission's benchmarking test.[180] To overcome this obstacle, Qwest's urges the Commission to accept Qwest's version of the benchmarking analysis, which relies on non-state-specific minutes of use assumptions. Qwest defends its use of non-state-specific minutes by pointing out that benchmarking comparisons require the state-specific minutes data (available from ARMIS) to be divided between interoffice and intraoffice minutes, and noting that Qwest has not made data showing that state-specific allocation available to CLECs or to the Commission.[181] Because AT&T and other CLECs do not have access to Qwest's state-specific interoffice vs. intraoffice minutes of use allocations, Qwest contends that a benchmarking comparison which uses state-specific total minutes and estimated state specific intraoffice/interoffice allocations is imperfect. The Commission has no choice in these circumstances, Qwest concludes, but to rely upon Qwest's national average-based comparisons. The Commission should give Qwest's argument no weight.

The premise of Qwest's claim – that allocating state-specific minutes using non-state-specific (but reasonable) allocation assumptions might change the outcome of the benchmarking analyses in this proceeding – is wrong. Changing the allocations that are applied to the state-specific minutes does not change the conclusions of any of the benchmarking analyses. Whether 100% or 0% of state-specific minutes are allocated to intraoffice minutes, the results of the benchmarking analyses are the same – all four states fail.[182] Because the actual state-specific

---

switch and (2) incorrectly assumes that local switching usage charges do not apply to long distance calls. *See* Qwest Pricing *Ex Parte* at 7. It is not clear the Qwest is correct. Nevertheless, these estimates include these changes, which have no impact on the conclusions of the analysis. *See* Pitkin Reply Decl. ¶ 3-4 & Figure 1.

[180] *See* AT&T at 55-58; WorldCom at 32-35.

[181] *See, e.g.,* Qwest Pricing *Ex Parte* at 2.

[182] *See* AT&T at 56.

allocations are obviously somewhere between 0% and 100%, there is no question that Qwest's analysis would flunk a fully state-specific benchmarking analysis. This fact is fatal to Qwest's argument that the Commission cannot rely on state-specific minutes of use assumptions because state-specific allocations of those minutes are unavailable.

Not surprisingly Qwest attacks this analysis. According to Qwest, "AT&T's analysis incorrectly assumes that Qwest imposes the local switching rate twice when a call originates and terminates within the same local switch," whereas Qwest, unlike other states, "imposes the charge only once in such circumstances."[183] Qwest also claims that "AT&T . . . incorrectly assumes that local switching usage charges do not apply to long-distance calls."[184] These arguments, however, are a red-herring. As demonstrated in the attached Reply Declaration of Brian F. Pitkin (¶ 3-4 & Figure 1), these changes do not affect the results of AT&T's analysis.

The Comments also show that there are other fundamental reasons to reject Qwest's use of standardized minutes-of-use assumptions. It is *Qwest's* burden to establish that its rates in the other states compare favorably to its benchmark state on a cost-adjusted basis. If Qwest chooses not to supply the Commission and the parties with the allocation data, then it cannot take advantage of the benchmarking shortcut. And if benchmarking is to be done in the face of Qwest's refusal to provide the actual allocation data, reasoned decision making and the Commission's own decisions require that it be done on the basis of the best available state-specific information.

Qwest's claim that it has not maintained such data is no answer.[185] Qwest bears the burden of proving that its application complies with Checklist Item 2, and Qwest is the only

---

[183] *See* Qwest Pricing *Ex Parte* at 7.
[184] *See id.*
[185] *See* Qwest Pricing *Ex Parte* at 2.

entity with access to that data. Qwest should not be permitted to justify its application based on a flawed (but beneficial to Qwest) benchmarking analysis on the ground that it has (conveniently) not collected the data necessary to conduct accurate benchmarking analyses.[186] And there is no question that BOCs can, and do, collect that information. Indeed, where that data was valuable to Verizon for obtaining section 271 approval in New Jersey, Verizon instantly produced state-specific minutes-of-use allocations.

In any event, as explained by WorldCom and AT&T, the fact that Qwest has not made its state-specific interoffice/intraoffice allocations available for the purposes of conducting a fully state-specific benchmarking analysis certainly does not mean that a better approach is to abandon *all* state-specific minutes of use data, and base the benchmarking approach on national minutes of use assumptions and national interoffice/intraoffice minutes allocations that are necessarily wrong.[187] On the contrary, to the extent that non-state-specific assumptions are necessary under either approach, common sense and basic mathematics dictate that a benchmarking analysis which starts with state-specific total minutes of use would more accurately reflect relative costs than an analysis that relies on *neither* state-specific total minutes, *nor* state-specific interoffice/intraoffice allocations.

Accounting For Rural States. The record also confirms that Qwest's benchmarking analysis fails to account for the fact that the Commission's Synthesis cost model is a poor

[186] As the Commission has explained, "UNE rates are set by state commissions based on state-specific costs divided by total demand. The UNE rates therefore necessarily reflect state-specific MOU and traffic assumptions. Use of state-specific MOU per-line and traffic assumptions to develop per-line per-month UNE-platform prices for a benchmark state and an applicant state is therefore consistent with the manner in which states establish the UNE-Platform rates." *See New Jersey 271 Order* ¶ 53. These Commission findings unambiguously confirm that the use of state-specific minutes of use produce far more accurate benchmarking results than do national average minutes. The Commission's benchmarking analysis is supposed to be an objective short cut test to assess whether an applicant state's rates fall within a reasonable range of TELRIC-compliance. To allow applicants to pick-and-choose the minutes of use on which to pin their applications – which can greatly affect that analysis – would allow applicants to game the system.

[187] *See* AT&T Comments at 57; WorldCom at 34-35.

indicator of non-loop cost differences between very rural states (*e.g.,* Wyoming and Montana) and less rural states (*e.g.,* Colorado) because the Synthesis Cost Model substantially overstates non-loop costs in rural states relative to less rural states, thereby substantially overstating any such cost justification for non-loop *rate differences*.[188] Correcting for that problem shows that analysis confirms that Qwest's Wyoming and Montana switching rates cannot be justified by a comparison to Qwest's Colorado switching rates. Qwest's Wyoming and Montana switching rates (based on state-specific minutes) are 32% and 52% higher,[189] on a cost adjusted basis, than those in Colorado, respectively.[190] Notably, even using the Commission's standardized minutes of use assumptions, this analysis shows that Qwest's Wyoming and Montana switching rates still exceed those of Colorado by 49% and 57%, respectively.[191]

The DOJ recognizes that the Synthesis Cost Model is a poor indicator of relative costs between very rural and rural states, and "urges the Commisison to consider this problem and

---

[188] AT&T Comments at 58-60; DOJ Eval. (Qwest II) at 19-20 (summarizing problems with the Montana and Wyoming benchmarking analyses and noting that "to be valid the [benchmarking] exercise must rely on accurate benchmark comparisons between the states at issue). The primary reason that the Synthesis Cost Model overstates non-loop cost differences between very rural and less rural states is that the Synthesis Cost Model vastly overstates cost differences for transport and for tandem switching (non-loop costs are equal to the sum of the costs of switch port, switch usage, switch features, *transport*, signaling, and *tandem switching*). *See id.* Therefore, to the extent that any switching-related benchmark analysis between rural states (*e.g.,* Wyoming and Montana) and less rural states (*e.g.,* Colorado) is appropriate, that analysis should at least exclude the costs of transport and tandem switching. *See id.*

[189] As noted above, these figures are based on Qwest's currently filed rates in all four states in the application, and on Qwest's original filed rates for Colorado. If the recent Colorado rate reductions were taken into account, the cost-adjusted rate differences between Montana, Utah, Washington and Wyoming compared to Colorado would be even larger.

[190] *See id*. Moreover, the fact that Qwest's Wyoming and Montana switching rates are higher than in Colorado on a cost adjusted basis is fatal to Qwest's claim that its rates can be rubber-stamped by this Commission for a second independent reason. As noted, "TELRIC rates are calculated on the basis of *individual* elements." *Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1678 (2002) (emphasis added). Hence, a BOC's rates for a network element comply with Checklist Item 2 only if they are "based on the cost . . . of providing . . . *the* network element." 47 U.S.C § 252(d)(1) (emphasis added). Therefore, to gain section 271 approval, a BOC must show that the rates for *each* of its network elements – including switching – comply with TELRIC principles. Because Qwest's switching rates cannot be justified based on a valid benchmark comparison, Qwest must prove, not simply assert, that its Wyoming and Montana switching rates are TELRIC-compliant. Qwest has not done so, and as demonstrated below, Qwest cannot show that its switching rates are TELRIC-compliant. On the contrary, Qwest's Wyoming and Montana switching rates are inflated by myriad clear TELRIC errors.

[191] *See* Pitkin Reply Decl. ¶ 17.

solutions to it."[192] And Qwest does not dispute that the Synthesis Cost Model is a poor indicator of non-loop cost differences between very rural states (*e.g.,* Wyoming and Montana) and less rural states (*e.g.,* Colorado). Instead, Qwest claims that AT&T also should have adjusted Qwest's switching rates in a way that mirrors the adjustment to AT&T's changes to the Commission's Synthesis Cost Model.[193] Qwest's argument makes no sense. The fact that the Synthesis Cost Model must be adjusted to make meaningful state-to-state *cost* comparisons does not mean that the state-to-state *rate* comparisons – which are base on actual data, not cost models – must also be adjusted.

The purpose of the benchmarking analysis is to determine whether the switching rate differences between two states are justified by switching costs. The switching rate differences are known because those differences are based on actual rates and state-specific minutes-of-use values. The costs differences, however, are not known. Consequently, those costs must be estimated. The Commission has used its Synthesis Cost Model to compute those cost differences. Because the Synthesis Cost Model may overstate those cost differences in certain circumstances, it is necessary to make adjustments to that model to ensure that the estimated state-to-state cost differences are neither vastly overstated or understated. There is no reason, however, to make any adjustments to the estimated rate differences, because those differences are not based on the Synthesis Model (or any other model).

Lacking any legitimate response to AT&T's showings, Qwest erects a strawman. Qwest asserts that "there is no basis for isolating one [Synthesis Model] input and then extrapolating from it to non-loop as a whole."[194] Qwest appears to be asserting that AT&T used a subset of

---

[192] *See* DOJ Eval. (Qwest II) at 20.
[193] *See* Qwest Pricing *Ex Parte* at 8-9.
[194] Qwest Pricing *Ex Parte* at 4, 8-9.

non-loop costs to estimate cost difference, but then used all non-loop rates to estimate loop rate differences. That is not true. As shown in the testimony filed by AT&T witnesses, AT&T's analysis compares the cost differences associated with switch port, switch usage, switch features and signaling to the rate differences associated with the same set of elements.[195] Both the cost and the rate differences used in AT&T's analyses exclude the transport and tandem elements because a valid benchmark test cannot be performed when those elements are included. Thus, Qwest's claim that AT&T's analyses is based on an improper "extrapolation" methodology is wrong.[196]

Lastly, Qwest urges the Commission to completely ignore AT&T's benchmarking analysis for Montana and Wyoming on the ground that the Commission should not re-examine its Synthesis Cost Model.[197] Qwest's request must be denied. The Commission itself has recognized that there are circumstances where its benchmarking approach may not produce valid results.[198] AT&T has demonstrated that this is one of those circumstances. Therefore, the appropriate Commission response is to either reject the benchmarking approach for these states, or at least attempt to make appropriate adjustments to fix the serious problems identified by AT&T. Thus, it is not necessary to the Commission to "re-examine" its Synthesis Cost Model, as Qwest suggests.

---

[195] Pitkin Reply Decl. ¶ 11.

[196] Qwest also asserts that removing tandem and transport elements from the analysis will affect the rates of the elements remaining in the analysis. *See* Qwest Pricing *Ex Parte* at 4. That is not true. AT&T's analysis computes total non-loop costs and rates for all states. Then AT&T removed the portion of the costs and rates associated with tandem and transport elements. That analysis has no impact on the remaining switching-related elements. In any event, even if changes to various inputs did have downstream impacts on other UNEs, those impacts are not relevant to determining whether the price of that element are TELRIC-compliant. The fact is that Qwest's rates do not pass a proper benchmark comparison, regardless of what the impact is on other UNEs. *See* Pitkin Reply Decl. 13.

[197] *See* Qwest Pricing *Ex Parte* at 3-4.

[198] *See, e.g., Rhode Island 271 Order* ¶ 38; *Pennsylvania 271 Order* ¶ 63; *Arkansas/Missouri 271 Order* ¶ 56.

B. Qwest's UNE Rates Create A Discriminatory "Price Squeeze" And Qwest's Deaveraging Method Deters Local Entry.

The DOJ recognizes that "the lack of [competitive] . . . entry [in the applicant states] may reflect, in part, the higher UNE pricing that was in effect for most of the period preceding this application."[199] That is true, and the record confirms high UNE pricing continues to foreclose competitive entry in the Qwest region. Indeed, Qwest's UNE rates in Montana and Washington preclude competitive local entry in those states in violation of Checklist Item Two.[200] Accounting for all possible potential revenues that may be available to new entrants – including interLATA toll contributions, IntraLATA toll contributions, and state and federal universal service revenues – AT&T's revenues are not sufficient to cover an efficient new entrant's costs in those states.[201] Moreover, even accounting for possible entry strategies that include a mix of UNE-based services and resale service, the margins available to new entrants are insufficient to support competitive local telephone entry. Indeed, after accounting for an efficient entrant's internal costs of entry, the margins that are available to new entrants in Montana and Washington are *negative*. Thus, Qwest's UNE rates in those states are discriminatory in violation of Checklist Item 2.[202]

Qwest advances a scattershot of baseless criticisms against AT&T's margin analysis. First, Qwest claims that AT&T should not account for NRCs because AT&T can pass those NRCs on to its customers.[203] That argument ignores the current competitive environment. Qwest currently serves virtually all local residential customers. Therefore, new entrants must convince existing Qwest residential customers to switch carriers. A business plan that charges

---

[199] DOJ Eval. (Qwest II) at 2.

[200] *See* WorldCom at 33-36; OneEighty at 5.

[201] *See* Lieberman/Pitkin Decl. ¶ 50-55.

[202] *See* AT&T at 69-71. The existence of a price squeeze also confirms that a grant of Qwest's application contravenes the public interest. *See* AT&T at 155-160.

residential customers a large up-front charge for making switch is not economically viable because customers will not pay for the privilege of switching to a new carrier. Nor is it economically feasible for a CLEC to increase local rates to recover NRCs. CLEC rates are effectively capped by the rates charged by the incumbent LEC because customers will not switch to a new entrant that is charging higher rates. As a result, CLECs must recover NRCs through local rates, that are no higher than those charged by incumbent LECs. Notably, even Qwest waives end user NRC charges when it attempts to win customers from other carriers.[204] AT&T's margin analysis correctly reflects that reality.

Second, Qwest claims that AT&T's access revenue estimates are too low.[205] Those access revenues are based on actual observed average toll-related minutes of use from TNS Telecoms Bill Harvest market research.[206] Qwest does not challenge the accuracy of either of those inputs. Instead, Qwest asserts that AT&T's access revenues are too high because they are higher than Qwest's estimates.[207] The primary reason that Qwest's estimates are higher than AT&T's estimates is that Qwest (not AT&T) incorrectly computed access revenues.[208]

Third, Qwest claims that AT&T and WorldCom's analysis is flawed because they compute margins based on state-specific data.[209] That argument is specious. The purpose of a margin analysis is to determine whether entry is economically feasible in a particular state.[210] To make that determination, it is necessary to account for the actual conditions in that state,

---

[203] *See* Qwest Pricing *Ex Parte* at 16-18.
[204] *See* Pitkin Reply Decl. 20.
[205] *See* Qwest Pricing *Ex Parte* at 16-18.
[206] *See* Pitkin Reply Decl. ¶ 21.
[207] *See* Qwest Pricing *Ex Parte* at 10-18.
[208] *See* Pitkin Reply Decl. ¶ 21.
[209] *See* Qwest Pricing *Ex Parte* at 16-18.
[210] *See* Pitkin Reply Decl. ¶ 22.

including the actual number of minutes in that state. A proper margin analysis – like the analysis performed by AT&T and WorldCom – therefore must reflect state-specific minutes.[211]

Fourth, Qwest claims that AT&T's analysis fails to account for the possibility that new entrants will find higher margins by offering a mix of residential and UNE-P services. Qwest is wrong. As explained in the declaration of Michael Lieberman, AT&T's analysis computed both the UNE-P margins and the resale margins that are available to new entrants in each zone. AT&T's state-wide margin figures are based on the higher of the two margins (the UNE-P and resale margins) that are available to new entrants in each zone.[212]

Fifth, Qwest claims that AT&T's stated internal costs of more than $10.00 are not supported.[213] That claim also is false. The declaration of Steven Bickley explains in detail how the $10.00 figure was computed. Furthermore, Mr. Bickley demonstrated that the $10.00 plus estimate is not based on AT&T's actual internal costs, but is based on (lower) projected figures that AT&T seeks to achieve in the future and that are a reasonable estimate of an efficient carrier's internal costs.

Even aside from the price squeeze, local entry in Wyoming and Montana also is foreclosed by Qwest's anticompetitive deaveraging methodology. Qwest and the state commissions in Wyoming and Montana implemented a deaveraging methodology that makes it virtually impossible for potential entrants to determine which customers are located in which UNE rate zones.[214] Consequently, potential new entrants must request that information from Qwest on a customer-by-customer basis.[215] This problem inhibits local entry in two ways. First,

---

[211] *See id.*; WorldCom 35-36.
[212] *See* Pitkin Reply Decl. ¶ 23.
[213] *See* Qwest Pricing *Ex Parte* at 16-18.
[214] *See* AT&T at 53.
[215] *See id.*

because the revenues available to new entrants vary widely from UNE zone to UNE zone, the inability to determine which potential customers are located in which UNE zone (except on a case-by-case basis) makes it difficult, if not impossible, to develop and implement an effective entry strategy. Second, because Qwest knows exactly where CLECs intend to enter – indeed, CLECs must request customer UNE zone information directly from Qwest – Qwest has the anticompetitive incentive and ability to misuse this highly sensitive business plan information to target CLEC customers.

Qwest response to this problem is that there are numerous ways that carriers can determine, on a customer-by-customer basis, the zone in which customers are located. However, that answer misses the point. The problem is not that potential competitors cannot eventually determine the zone in which a particular customer resides, rather the problem is that potential local competitors' are unable to efficiently develop entry plans on a wide-scale basis without first entering each customers information (on a customer-by-customer basis) into one of Qwest's databases to determine the zone wherein each customer in a particular area resides. That process is simply too cumbersome, too costly, and too unreliable. Moreover, Qwest's naked "promise" that it does not share its competitors' inquiries regarding customer locations with its retail unit for the purposes of forestalling competitive entry cannot be relied upon. Indeed, Qwest is a particularly poor candidate for the "trust me" approach, as is evidenced by Qwest's recent concessions that it mislead its own investors with inaccurate financial statements.

IV. QWEST DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO INTERCONNECTION, UNBUNDLED NETWORK ELEMENTS, AND RESALE.

AT&T demonstrated in detail in its comments that Qwest denies nondiscriminatory access to interconnection, unbundled network elements, and resale in a number of respects.[216] In these Reply Comments, AT&T addresses certain arguments Qwest advanced in support of its policies in its July 29, 2002 Reply Comments in the *Qwest I* proceeding.

1. In its comments, AT&T demonstrated that Qwest's trunk forecasting requirements are discriminatory and in violation of Qwest's interconnection obligations.[217] Under Qwest's SGATs (§ 7.2.2.8.6), if the CLEC's utilization has been below 50% in the previous 18 months, and the CLEC's forecasts for its own trunking are higher than what Qwest thinks the CLEC will need, the CLEC must pay Qwest a deposit in order to obtain the full amount of trunking that it has forecasted for itself. And if the CLEC's utilization does not reach 50 percent of the CLEC's forecast within 6 months, the CLEC loses its deposit (in whole or in part).[218]

Qwest's attempts to explain the impact of its forecasting policies in its July 29 Reply Comments (at 67-68) are unavailing. Because of the nature of their operations, virtually all CLECs average less than 50 percent utilization over any 18 month period, and thus would be required under Qwest's SGATs to place deposits to order the trunking they need. Rather than give Qwest deposits that they will almost certainly lose, CLECs instead moderate their growth and delay placing traffic on interconnection trunks until they can avoid the need to place such deposits. In other words, Qwest's policies force CLECs to accept less interconnection trunking

[216] *See* AT&T at 96-121, & Wilson Declaration.
[217] *See* AT&T at 100-03.
[218] *See* SGAT § 7.2.2.8.6.1.

that they can use, and because no CLEC can risk blocking of calls, AT&T will literally delay putting customers on their network, and will carefully manage when it adds traffic to the network, to prevent such blocking. The practical effect of these provisions is that CLECs scale back their facilities-based market entry.

Qwest's response is to attempt to make a virtue of the "voluntariness" of the Hobson's choice it places on CLECs.[219] The fact that CLECs can choose between two blatantly anticompetitive options – *i.e.*, whether to moderate its growth to avoid blocking of calls or whether to pay (and lose) deposits to Qwest – does not make the choice lawful. Qwest has no justification for insisting on the deposits in the first place; the CLEC is already paying for the trunks and has every incentive to use them as efficiently as it can.[220]

Qwest also misses the point in its July 29 Reply Comments when it asserts that Qwest has never exercised its right to snatch back trunks from CLECs.[221] The SGAT provisions indisputably give Qwest the right to snatch back trunks, and therefore Qwest does not provide nondiscriminatory interconnection (and thus Qwest has failed to satisfy the checklist).[222]

2. AT&T also demonstrated that Qwest's SGATs in Washington, Utah, and Wyoming arbitrarily limit the length of interconnection trunks that it will construct between Qwest switches to 50 miles. In other words, when a CLEC wishes to purchase interconnection trunks that would involve transport of more than 50 miles between Qwest switches, and Qwest

---

[219] *See* Qwest July 29 Reply Comments at 68 ("CLECs choose whether or not to place deposits").

[220] The fact that Qwest's performance metrics indicate that blockage on interconnection trunks is low is irrelevant. *See* Qwest July 29 Reply Comments at 69. CLECs scale back their entry to make sure that they avoid blocking of calls. Moreover, as explained in AT&T's *ex parte* letter dated August 21, 2002, Qwest's performance metrics are aggregate measures that, by design, mask blocking that can occur on individual trunks and that can have significant anticompetitive consequences.

[221] *See* July 29 Reply Comments at 68.

[222] *See* Wilson Decl. ¶ 23.

lacks adequate capacity on such a route, Qwest requires the CLEC to build the additional capacity for Qwest.[223]

Qwest's only response is to claim that its policies represent a "compromise" that has been blessed by the relevant state commissions.[224] But Qwest never addresses the statutory violation at issue. As the Commission recently reaffirmed, section 251(c)(2) gives CLECs "the right to request a single point of interconnection in a LATA."[225] Moreover, the rules implementing the reciprocal compensation provisions of the Act "prevent any LEC from assessing charges on another telecommunications carrier for telecommunications traffic that originates on the LEC's network."[226] And as the Commission has made clear, "under these rules, to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic."[227]

Qwest's 50-mile policy violates section 251(c)(2) and these rules. Qwest's policy applies only to trunking *within* Qwest's network, between Qwest wire centers – *i.e.*, on Qwest's side of the point of interconnection. But as the Commission has held, it is Qwest's responsibility to "bear financial responsibility" for establishing whatever trunking is needed for Qwest to deliver its traffic to the POI selected by the CLEC. Qwest's 50-mile policy forces the CLEC to pay to upgrade Qwest's network, and effectively denies the CLEC its right to select the POI. Indeed, Qwest's Washington SGAT unambiguously denies a CLEC the right to choose its POI, because in that state Qwest's 50-mile policy dictates that the CLEC must build to a meet-point.

[223] *See* AT&T at 105-06.
[224] Qwest July 29 Reply Comments at 69-70.
[225] *Virginia Arbitration Decision* ¶ 52.
[226] *Id.*; 47 C.F.R. § 51.703(b).
[227] *Virginia Arbitration Decision* ¶ 52; *see also id.* ¶ 67.

3. Qwest also cannot defend its discriminatory policies on "new facilities." As AT&T demonstrated in its comments, in all states except Washington, Qwest may refuse to build the new facilities necessary to provision a CLEC's UNE order in circumstances when Qwest would build such facilities to provision its own customer's order. And in all states except Washington, Qwest is allowed to reject a CLEC's UNE order (either immediately or, in Montana, after 30 days) if Qwest concludes that capacity is not available, instead of holding the order indefinitely until capacity is available, as Qwest does for its own retail customers.

Qwest's July 29 Reply Comments again mischaracterize the issue.[228] The issue is of one of straightforward discrimination. Qwest refuses to augment or build new facilities in situations in which Qwest would augment or build for itself, and Qwest cancels CLEC UNE orders in situations in which Qwest would hold the order for its own customer (and thus maintain that customer's place in the queue). Qwest does not deny that these are its policies or that they are discriminatory. As such, these policies are blatantly anticompetitive and violate section 251(c)(3).

Qwest also mischaracterizes the Eighth Circuit's holding in *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 813 (8th Cir. 1997).[229] In the quoted passage, the court was addressing the Commission's "superior quality" rules, which required the quality of a UNE and the quality of the access to that UNE, "upon request, [to] be superior in quality to that which the incumbent LEC provides to itself."[230] The court held merely that the statute does not require ILECs "to alter substantially their networks to provide superior quality interconnection and unbundled

---

[228] *See* Qwest July 29 Reply Comments at 74 (ILECs are not required to "satisfy every desire of every requesting carrier").
[229] *See* Qwest July 29 Reply Comments at 74.
[230] *See Local Competition Order*, Appendix B at B-18.

access."[231] The court was not addressing policies like the Qwest "new facilities" policy, in which Qwest refuses to give to CLECs what it gives to itself.

Moreover, the "new facilities" at issue here are routine augmentations that Qwest continually performs for itself, and Qwest's attempts to dramatize the costs of such augmentations are unavailing. For example, Qwest focuses on the costs of adding electronics to augment the capacity of existing interoffice transport, but Qwest's claims are overstated. Indeed, if a CLEC request for dedicated transport required a project the size and scope of what Qwest describes,[232] Qwest's network would be at or near capacity, and Qwest would likely need to undertake that project for its own network needs.[233] The bottom line is that if Qwest would add or upgrade electronics to increase the capacity of its transport network to serve its other customers, Qwest should do so for CLECs seeking unbundled dedicated transport.

If anything, Qwest's "new facilities" policy is inconsistent with TELRIC and results in excessive UNE rates to *CLECs*. As AT&T has explained, TELRIC studies do not simply estimate the costs to replace the existing network but assume construction of a new network, using existing wire centers, that is sufficient to meet current and anticipated future demand. TELRIC studies include "fill factors," which represent network utilization or the amount of spare capacity for each type of facility to accommodate future growth. In other words, CLECs pay UNE rates that compensate Qwest for maintaining spare capacity to serve future demand, including construction of additional network capacity to ensure the existence of such spare

---

[231] *See* 120 F.3d at 813 n.33.

[232] *See* July 29 Reply Comments at 76-77.

[233] Many of Qwest's figures are also inflated because they appear to represent the costs to provide fully deployed equipment. If Qwest were to upgrade an existing OC-12 to an OC-48, for example, Qwest would install only the line cards needed to serve the demand at the time of installation, far less than what Qwest suggests. *See* Qwest July 29 Reply Comments at 77.

capacity. Implicit is these rules is the requirement that Qwest will provide such additional capacity to CLECs when it is needed, just as Qwest provides such capacity to itself.[234]

4. Qwest also unlawfully applies the Commission's "use restrictions" to combinations of dark fiber loop and transport.[235] In response to a query from the Commission staff, Qwest recently filed an *ex parte* letter explaining that Qwest applies the use restrictions only when Qwest combines the dark fiber loop and transport prior to delivery to the CLEC, and not when the CLEC combines the two elements itself.[236]

Although Qwest's concession is welcome,[237] Qwest's policies remain unlawful. As AT&T explained, the Commission's use restrictions apply only when a CLEC wishes to convert an existing special access circuit to a combination of UNE loop and transport.[238] Whether Qwest combines the dark fiber elements or whether the CLEC does, it is undisputed that the fiber UNEs are *unlit* at the time they are delivered to the CLEC.[239] By definition, therefore, Qwest is not offering any special access services over the facilities at issue, and the CLEC is not attempting to convert an existing special access circuit to UNEs. In the case of a dark fiber "EEL," Qwest does not lose any existing special access revenues, and as a result it could not even theoretically lose any existing implicit universal service subsidies (assuming such subsidies remained in

---

[234] *See* Wilson Decl. ¶ 45.

[235] *See* AT&T at 117-18.

[236] *See* Letter from Yaron Dori (Qwest) to Marlene H. Dortch (FCC), dated August 16, 2002 (Question 1) ("*Qwest Dark Fiber Ex Parte*") ; *see also* Qwest July 29 Reply Comments at 79.

[237] It should be noted that Qwest's SGATs do not make such a distinction. *See* SGAT § 9.7.2.9 ("CLEC shall not use UDF [unbundled dark fiber] that is part of a loop-transport combination, as a substitute for special or switched Access Services, except to the extent CLEC provides a 'significant amount of local exchange traffic' to its End Users over the UDF as set forth by the FCC").

[238] *See* AT&T at 117.

[239] *See Qwest Dark Fiber Ex Parte*, Question 1 at 1-2 (when Qwest combines the dark fiber elements, "[t]he CLEC would be required to place suitable electronics at the end-user end of the dark fiber loop and at the distant end of the transport UNE to light the dark fiber EEL").

special access rates, which they do not). For these reasons, the Commission's use restrictions do not apply to dark fiber EELs.

5. Finally, AT&T demonstrated (at 103-05) that Qwest's SGATs in Montana and Wyoming (§ 7.2.2.9.3.2) prohibit CLECs from placing interconnection traffic on the trunk groups they have already established to carry toll traffic, and that all four SGATs (§ 7.3.1.1.2) effectively prevent CLECs from placing interconnection traffic on spare private line facilities, by charging CLECs private line rates for all trunks associated with a given facility, even if some trunks are available to carry interconnection traffic. As AT&T showed, these practices prevent CLECs from efficiently using their existing, spare trunk capacity for interconnection, and further drive up the costs of interconnection with Qwest.

In its July 29 Reply Comments (at 85-86), Qwest suggested that the Commission has already specifically considered and rejected the efficient proportional pricing scheme that AT&T has proposed. That is incorrect. In the case upon which Qwest relies, *Net2000 Communications Inc.* v. *Verizon*, 17 FCC Rcd. 1150 (2002) ("*Net2000*"), the Commission was considering whether its rules permitted proportional pricing for special access and *UNE traffic* on the same DS-3 transport facility. The Commission concluded that its rules establishing "use restrictions" and a ban on commingling of access and UNE traffic on EELs prohibited such proportional pricing (or "ratcheting").[240] But there are no analogous "use restrictions" on *interconnection trunks*. To the contrary, Section 252(d)(2) and the Commission's rules unambiguously require traffic carried over interconnection trunks to be priced at TELRIC, and Qwest has yet to explain how its tariffs, which prohibit purportedly proportional pricing for special access and interconnection traffic, comply with the statute.

[240] *See Net2000* at ¶ 28; Qwest July 29 Reply Comments at 86.

V. QWEST HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272.

Qwest now concedes that its accounting records violate § 272, and that Qwest is not yet fully aware of the full extent to which its accounting practices are unlawful. The Commission has emphasized that "the separate affiliates prescribed under section 272(a)(2) must maintain their books, records, and accounts in accordance with GAAP."[241] And Qwest now admits that its internal investigations have determined that its accounting practices "did not comply with the requirements of GAAP," and that its witness statements to the contrary are not true.[242] Nor is Qwest currently in the position to "certify" that its "financial statements are accounted for in a manner consistent with GAAP."[243]

The Commission has stressed that "compliance with section 272 is 'of crucial importance' because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field."[244] Therefore, the Commission has determined that "[a]s a pre-condition to entry under section 271,"[245] Qwest and its section 272 affiliate must present evidence, not "paper promises," that establishes they will comply "with the requirements of section 272."[246] Qwest's concession that it has not complied with, and is currently not complying with, the requirements of § 271 is therefore fatal to its application.

Qwest's only response to this blatant violation of the Commission's § 272 requirements is that its failure to comply with GAAP does "not implicate the Act's concerns regarding

[241] *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 17539, ¶ 170 (1996).

[242] *See* Letter from Oren G. Shaffer (Qwest) to Marlene H. Dortch (FCC Secretary), WC Docket Nos. 02-148 & 02-189 (filed August 20, 2002) ("Qwest Accounting Letter").

[243] *See id.*

[244] *Texas 271 Order* ¶ 395 (quoting *Michigan 271 Order* ¶ 346).

[245] *Non-Accounting Safeguards Third Order On Reconsideration* ¶ 2.

[246] 47 U.S.C. § 271(d)(3)(B); *Michigan 271 Order* ¶ 55 (holding that "paper promises" cannot satisfy the BOC's burden under § 271).

improper allocation, cross-subsidization and discrimination."[247] But this assertion is only a guess on Qwest's part. Qwest concedes that its internal investigation of the full extent of its accounting errors is *not yet known* and that "additional analysis is in progress regarding these matters."[248] In any event, Qwest provides no evidence that its violations of the Commission's accounting rules do not extend to the Act's concerns regarding improper allocation, cross-subsidization and discrimination. Where a carrier does not comply with GAAP, that carrier is presumptively violating § 272. Qwest therefore bears a substantial burden of proving otherwise, and Qwest has not remotely satisfied this burden.

Moreover, neither Qwest nor any state commission has rebutted AT&T's showings that Qwest has violated is Section 272 obligations in myriad other respects. Despite the critical nature of section 272 compliance, the few commenters that have discussed section 272 compliance – the state commissions of Wyoming and Montana – present no new evidence to meet Qwest's burden. In fact, these comments do not even discuss, let alone refute, the matters raised in AT&T's opening comments that established Qwest's failure to meet its burden of proof.

For example, none of the commenters discuss Qwest's failure, as found by the Minnesota ALJ, to present evidence that it does not and will not jointly own switching and transmission facilities, either directly or indirectly, with its section 272 affiliate. Qwest's bare promises on this topic should be afforded no weight, especially given that Qwest chooses to not even describe its network ownership plans except in the vaguest terms.

The limited comments from the state commissions on section 272 also present no further evidence concerning the requirement, in section 272(b)(3), that Qwest and its section 272 affiliate have "separate officers, directors, and employees." As the Minnesota ALJ found, Qwest

---

[247] Qwest Accounting Letter at 2.
[248] *Id.*

is barred by section 272(b)(3) from maintaining an integrated workforce of BOC and affiliate employees, with regular "transfers" back and forth between the companies and overlapping reporting relationships. The only commenter that even discusses compliance with section 272(b)(3) – the comments from the North Dakota commission, *see* pp. 189-90 – simply recite Qwest's promises concerning employee separation, without reviewing any tangible evidence as called for by the Minnesota ALJ.

Nor do any commenters discuss or refute the Minnesota ALJ's finding that Qwest was in violation of section 272(b)(5)'s requirement of "arm's length" transactions because both Qwest and its section 272 affiliate depend on their joint parent, QSC, to provide legal, public policy, and financial services for all of their transactions. And no commenter has explained how Qwest can be found to have posted all section 272 affiliate agreements when no agreements are posted to reflect the (undisputed) coordinated, planned transfer of employees between these companies.

Finally, the commenters offer no discussion concerning Qwest's failure to establish that it will comply with its nondiscrimination obligations under section 272(c) and with the joint marketing restrictions of section 272(g). As AT&T established in its opening comments, echoing the findings of the Minnesota ALJ earlier this year, the joint services on which Qwest and its affiliate are dependent present both the opportunity and incentive for serious misuse of confidential information. Qwest and the commenters do not even acknowledge this problem, let alone present any evidence of Qwest's efforts to prevent the misuse of such confidential information by joint-service providers. Similarly, the commenters, like Qwest in its application, ignore Qwest's obligations to submit tangible proof of its planned compliance with the joint-marketing restrictions under section 272(g) (including the equal access requirements), despite the fact that Qwest already billed the affiliate over $500,000 for joint-marketing planning.

At bottom, the limited comments submitted concerning section 272 compliance highlight, rather than remedy, the core problem with Qwest's application. Qwest cannot meet its burden by relying (as it does) on paper promises of section 272 compliance, especially in light of the multiple and specific findings of noncompliance by the Minnesota ALJ.

VI. QWEST'S ENTRY INTO THE INTERLATA MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST.

As AT&T and other commenters demonstrated, Qwest has engaged in a pattern of discriminatory and other anticompetitive conduct that precludes any finding that Qwest's local markets are open to competition and will remain open if Qwest receives the requested interLATA authority. Specifically, over the past five years, Qwest and its predecessor US WEST engaged in a pervasive effort to forestall competition in its local exchange markets at the same time that it launched illicit efforts to provide service across LATA boundaries.[249] In a variety of states and a variety of ways, Qwest has been responsible for inhibiting local entry, having been adjudicated "guilty" for, among other things, repeatedly violating section 271 and refusing to permit UNE-P testing and to provide access to inside wiring in multiple dwelling units.[250] And, as discussed above, Qwest has been revealed to have entered patently discriminatory secret interconnection deals, failing to file the agreements as required by Section 252, and worse yet, attempting to evade informed state commission and FCC review of its compliance with Section 271 checklist requirements by purchasing with these secret discriminatory deals the silence of complaining CLECs.[251]

These ongoing anticompetitive and unlawful actions – which seem to multiply every day – conclusively refute Qwest's claim that it is, and will remain, committed to accelerating and

[249] AT&T Comments at 131-159.
[250] *Id*. at 133-147.
[251] *Id.* at 17-30, 134-136.

completing the process of opening its local markets to competition. Indeed, it seems that the numerous federal investigations into Qwest's unlawful accounting and other practices reveal new anticompetitive conduct almost every day. As one example, a recent Qwest press release confirms that Qwest *currently* is unlawfully providing long distance services. AT&T and other commenters demonstrated that Qwest's sales of "lit fiber capacity IRUs" constituted the provisioning a long distance services in violation of section 271.[252] Although Qwest claims that these lit fiber capacity IRUs constitute the "sale" of long distance assets – and therefore are not telecommunications services covered by § 271(a) – the record evidence demonstrates that Qwest's lit fiber capacity IRUs are virtually indistinguishable from private line services.[253] Indeed, Qwest has aggressively marketed the lit fiber capacity IRUs to "winback" private line customers that it was required to divest in connection with the US WEST merger.[254]

Qwest's recent press release confirms that Qwest's lit fiber capacity IRUs are service contracts and not asset sales. In a July 28, 2002 Press Release entitled "Qwest Communications Provides Current States of Ongoing Analysis Of Its Accounting Policies And Practices,"[255] Qwest issued guidance to the investment community regarding the progress of its internal audit of Qwest's highly questionable accounting practices relating to the treatment of IRUs. Consistent with its advocacy before the Commission, Qwest had in the past maintained for financial accounting purposes that IRUs were asset sales and, therefore, all the revenue from the sales would be booked up front, rather than spread out over the life of the IRU, as would be

[252] DOJ Eval. (Qwest II) at n.6 (recommending long distance approval *only* if the FCC "is able to assure itself that the concerns expressed in this Evaluation have been resolved"); CompTel Qwest I Comments at 7-13; Touch America Comments at 13-19.

[253] *See* AT&T at 10-43. AT&T demonstrated the § 271 violations being committed by Qwest in greater detail in its May 2, 2002 Comments in CC Docket No. 99-272.

[254] *See* AT&T 143.

appropriate in the case of "operating leases or [a] services contract." Not only does the Qwest IRU Press Release make clear that Qwest is likely to restate its financial reports to account for the previously sold IRUs as services, it unequivocally states that "[t]he company has previously disclosed that it does not plan on any sales of optical capacity in 2002 that would be treated as sales type leases and require recognition of revenue up front."

Given that Qwest has now announced that it plans to continue selling lit fiber capacity IRUs, it must be the case (assuming the Qwest IRU Press Release is truthful) that Qwest is now treating these lit fiber capacity IRUs as "services contracts" and not asset sales. And given that it is the purpose of the securities accounting laws to ensure that companies account for transactions in the way that best reflects economic reality, there can be no legitimate claim that the lit fiber IRUs can be considered asset sales for the purposes of § 271.

As noted, Qwest also now concedes that its accounting records violate § 272, and that Qwest is not yet fully aware of the full extent to which its accounting practices are unlawful. According to Qwest, its internal investigations have determined that its accounting practices "did not comply with the requirements of GAAP," and that its witness statements to the contrary are not true.[256] Moreover, Qwest still is not in a position to "certify" that its "financial statements are accounted for in a manner consistent with GAAP."[257] And even though the Commission has emphasized that "the separate affiliates prescribed under section 272(a)(2) must maintain their

---

[255] A copy of the Qwest IRU Press Release is attached to AT&T's Letter from C. Fredrick Beckner III (AT&T) to Marlene H. Dortch (FCC Secretary), CC Docket Nos. 02-148, 02-189, 99-272 (filed August 15, 2002) ("Qwest IRU Press Release").

[256] *See* Letter from Oren G. Shaffer (Qwest) to Marlene H. Dortch (FCC Secretary), WC Docket Nos. 02-148 & 02-189 (filed August 20, 2002) ("Qwest Accounting Letter").

[257] *See id.*

books, records, and accounts in accordance with GAAP,"[258] Qwest continues to assert that these problems are not relevant to its § 271 application.

With respect to Qwest's secret deals, just days ago Qwest announced plans to dump a truckload of such deals at the Commission's doorstep. Clearly there is not sufficient time to evaluate whether the last minute data dump reflects all of the secret deals, the extent to which the unlawful secret deals have impacted competition, or for the Commission (or state commissions) to remedy the myriad anticompetitive results of those secret deals. As noted, the Iowa commission found that even after Qwest purported to file all relevant secret deals with the Iowa commission's investigators, it was discovered that there remained numerous secret deals that Qwest had withheld from the investigators.

It is difficult to imagine a more compelling "public interest" case for the denial of Section 271 authority than the situation in which Qwest has placed the Commission. Every party, from the DOJ to competing CLECs to the states, has recognized the severity of Qwest's own conduct in negotiating, entering and concealing the secret interconnection agreements that *already* have been the subject of adverse findings by independent governmental bodies in Iowa, Arizona and Minnesota. In this time of national resolve to establish and mandate corporate responsibility and effective government oversight, the Commission must find the resolve to deal squarely and forthrightly with Qwest's malfeasance.

Qwest's conduct is part of an extensive tradition of contempt for the "market opening" provisions of the Act. From its three FCC-adjudicated violations of Section 271 to its ongoing violations of that section and the Qwest-US WEST merger orders, from its refusal to test UNE-P in Minnesota to its entry inhibiting actions in Colorado and Washington, from its concealment of

[258] *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 17539, ¶ 170 (1996).

secret deals in Iowa to its similar concealment of such deals in Arizona and every other Qwest state, Qwest has attempted to thwart competition with the hope that any long-delayed sanction will be a trivial cost of doing illicit business. And a grant of Section 271 interLATA authority will reward this strategy.

Granting Qwest's application is not in the public interest for an additional reason as well. All of the QPAPs on which Qwest relies are wholly inadequate to deter future backsliding. No anti-backsliding plan can be effective unless it is based upon a comprehensive set of performance measures producing accurate and reliable results. The unreliability of Qwest's performance data which serve as the point of departure against which to assess backsliding precludes the effectiveness of any performance enforcement plan.[259]

Even if Qwest's performance data were accurate – and they are not – Qwest's performance assurance plans contain fundamental defects that prevent them from serving as an effective deterrent against future backsliding. Thus, for example, the performance assurance plans do not currently include a measure on service order accuracy. As a consequence, Qwest will suffer no financial consequences for subpar performance in this area.[260] Qwest cannot fill this void by its most recent request to the state commissions to include in the QPAPs its proposed PO-20 measure on manual order accuracy – a measure which has not yet been adopted by the States and which is so limited in scope that it provides no incentives for Qwest to improve its performance in this area.[261]

Furthermore, the Washington, Montana and Wyoming QPAPs are fundamentally infirm in other important respects. This Commission has recognized the vital role that state regulatory

---

[259] Finnegan Decl. ¶¶ 18-129, 201-203.

[260] *Id.* ¶¶ 204-205.

[261] *See ex parte* letter from Yaron Dori (Qwest) to Marlene H. Dortch, dated August 9, 2002. *See also* Finnegan/Connolly/Menezes Decl. ¶ 195 (discussing the failure of PO-20 to assess accuracy of USOCs and FIDs).

agencies must play in enforcing a BOC's compliance with its statutory obligations and assuring that performance enforcement plans continue to reflect the changes in the telecommunications market.[262] This Commission also has found that a critical issue under the public interest test is whether "the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention."[263] However, the Washington and Montana QPAPs – which permit Qwest to challenge the authority of the states to implement any changes to the plans – invite "protracted and contentious legal proceedings" which can "significantly delay the development of local competition," defeat the fundamental objective of self-executing mechanisms, and assure that the QPAPs will never evolve at a pace consistent with the dynamics of the marketplace.[264]

Additionally, as the comments of the Wyoming PSC confirm, there is no QPAP presently in place in Wyoming because the "Qwest QPAP, as filed with the Commission and previously repeatedly disapproved by the Wyoming PSC" includes "critical elements which do not conform to the public interest standard…."[265] Indeed, the Wyoming PSC explains that "Qwest repeatedly refused to address the majority of the problems identified in the Wyoming QPAP," and that Qwest's Application does not "present[] a complete or accurate discussion" of the basis for the Wyoming PSC's rejection of this plan.[266] In describing the myriad deficiencies in the plan, the Wyoming PSC points out that Qwest's QPAP imposes "an unfair, complex and administratively burdensome cap on its liability under the QPAP" and limits the ability of the Wyoming PSC to

[262] Finnegan Decl. ¶¶ 228-232; Wyoming ¶ 32.
[263] *Michigan 271 Order* ¶ 394.
[264] *Id*. *See also* Finnegan Decl. ¶¶ 234-247.
[265] Wyoming ¶¶ 30, 32.
[266] *Id.* ¶ 35.

"review this complex cap except when it is agreeable to Qwest."[267] Furthermore, the Wyoming PSC also acknowledges that Qwest failed to provide any sound basis for the caps on the billing measurements in its plan.[268] The Wyoming PSC also explains that Qwest flouted an Order requiring the inclusion of an unequivocal statement in the QPAP confirming the Wyoming PSC's authority to monitor and revise the QPAP and inserted provisions which "invite[] expensive litigation and burdensome administrative proceedings," "frustrate the Wyoming PSC's 'active oversight,'" and "insulate Qwest going forward from meaningful scrutiny."[269] For all of these reasons, the Wyoming QPAP upon which Qwest relies fails to meet the public interest standard and cannot possibly serve as an effective deterrent against anticompetitive conduct in the wake of Section 271 relief.

[267] *Id.* ¶ 32. *See also* Finnegan Decl. ¶¶ 218-221.

[268] Wyoming ¶ 32 (e); Finnegan Decl. ¶ 223.

[269] Wyoming ¶ 32 (c); Finnegan Decl. ¶¶ 224-228. *See also* DOJ Eval. (Qwest II) at 6 (footnote omitted) (noting that the Wyoming PSC "raised significant concerns about its ability to require changes in the future to the Wyoming QPAP, which it left to the FCC to resolve").

CONCLUSION

For the foregoing reasons, and for the reasons set out in AT&T's initial comments, Qwest's application for authorization to provide in-region, interLATA services in Montana, Utah, Washington, and Wyoming should be denied.

Respectfully submitted,

/s/ Mark C. Rosenblum

Mark C. Rosenblum
Lawrence J. Lafaro
Richard A. Rocchini
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4263

Mary B. Tribby
AT&T Communications of the Mountain States, Inc.
1875 Lawrence Street, Room 1575
Denver, Colorado 80202
(303) 298-6163

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD
Bank One Plaza
10 South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Mark E. Haddad
Ronald L. Steiner
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
555 West Fifth Street
Los Angeles, California 90013
(213) 896-6000

David L. Lawson
Mark Schneider
R. Merinda Wilson
James P. Young
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

August 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2002, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: August 26, 2002
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

SERVICE LIST

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554[270]

Qualex International
Portals II
445 12th Street, SW, Room CY-B402
Washington, D.C. 200554

Janice Myles
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Steve Vick
Montana Public Service Commission
P.O. Box 202601
Helena, MT 59620

Julie Orchard
Public Service Commission
Heber M. Wells Building
Fourth Floor
160 East 300 South
Salt Lake City, UT 84111

Carole J. Washburn
Washington UTC
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Stephen G. Oxley
Wyoming Public Service Commission
2515 Warren Avenue, Suite 300
Cheyenne, WY 82002

Ryan Harsch
U.S. Department of Justice
Antitrust Division
Telecommunications and Media
Enforcement Section
1401 H Street, NW, Suite 8000
Washington, D.C. 20530

Peter A. Rohrbach
Mace J. Rosenstein
Linda L. Oliver
David L. Sieradzki
Hogan & Hartson
555 13th Street, NW
Washington, D.C. 20004

Walter J. Steimel
Greenburg Traurig LLP
800 Connecticut Avenue, NW
Suite 500
Washington, D.C. 20006

Brooks Harlow
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101

David R. Conn
McLeodUSA Telecommunications
McLeodUSA Technology Park
6400 C Street, SW
Cedar Rapids, IA 52406-3177

Debbie Goldman
George Kohl
Communications Workers of America
501 3rd Street, NW
Washington, D.C. 20001

[270] Filed electronically via ECFS

Marybeth Banks
Sprint Communications Company
401 9th Street, NW, Suite 400
Washington, D.C. 20004

Lori E. Wright
Jenner & Block
1133 19th Street, NW
Washington, D.C. 20036

Praveen Goyal
Covad Communications
600 14th Street, NW
Suite 750
Washington, D.C. 20005

Karen L. Clausen
Eschelon Telecom, inc.
730 2nd Avenue South, Suite 1200
Minneapolis, MN 55402-2456

Rogena Harris
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, D.C. 20007-5116